No. 92-5129-CSY
Status: GRANTED

Title: John Sullivan, Petitioner
v.
Louisiana

Docketed:
July 8, 1992

Court: Supreme Court of Louisiana

Counsel for petitioner: Keppel,William, Reed,John W.

Counsel for respondent: Ieyoub,Richard P., Peebles,Jack

Entry	Date	Note	Proceedings and Orders
1	Jul 8 1992	G	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
3	Aug 13 1992		DISTRIBUTED. September 28, 1992
4	Aug 24 1992	P	Response requested -- JPS. (Due September 24, 1992)
5	Aug 28 1992		Brief amicus curiae of National Assn. of Criminal Defense Lawyers filed.
6	Sep 24 1992		Brief of respondent Louisiana in opposition filed.
7	Oct 1 1992		REDISTRIBUTED. October 16, 1992
8	Oct 1 1992	X	Reply brief of petitioner filed.
10	Oct 19 1992		Petition GRANTED. **********
11	Nov 16 1992	G	Motion of petitioner for appointment of counsel filed.
12	Nov 30 1992		Motion for appointment of counsel GRANTED and it is ordered that John W. Reed, Esquire, of New Orleans, Louisiana, is appointed to serve as counsel for the petitioner in this case.
13	Dec 2 1992		Joint appendix filed.
14	Dec 3 1992		Brief amicus curiae of National Association of Criminal Defense Lawyers filed.
16	Dec 8 1992		Brief of petitioner John Sullivan filed.
17	Dec 29 1992		Brief of respondent Louisiana filed.
18	Feb 3 1993		Record filed.
		*	Original proceedings Supreme Court of Louisiana/Criminal District Court,Parish of Orleans(BOX)(*SEALED ENVELOPE)
19	Feb 3 1993		SET FOR ARGUMENT MONDAY, MARCH 29, 1993.(3RD CASE).
21	Feb 3 1993	X	Reply brief of petitioner filed.
20	Feb 4 1993		CIRCULATED.

92-5129 (2)

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1992

JOHN L. SULLIVAN
Petitioner,

vs.

STATE OF LOUISIANA
Respondent.

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

Petitioner by his undersigned counsel, asks leave to file the pleadings submitted herewith without payment of costs and to proceed *in forma pauperis*. Petitioner has been proceeding *in forma pauperis* in this case since his arraignment on May 12, 1980. Petitioner's affidavit of indigency is attached hereto.

Respectfully submitted,

William J. Keppel (by TJB)

Dated: July 8, 1992

William J. Keppel
Counsel of Record
Michael J. Wahoske
Christopher J. Riley
Tamara J. Byram
Karen A. Fairbairn
DORSEY & WHITNEY
2200 First Bank Place East
Minneapolis, Minnesota 55402
Telephone: (612) 340-2600

Supreme Court, U.S.
FILED
7-8- 1992
OFFICE OF THE CLERK

John Wilson Reed
GLASS & REED
338 Lafayette Street
New Orleans, Louisiana 70130
Telephone: (504)581-9065

Attorneys for Petitioner

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1992

JOHN L. SULLIVAN
Petitioner

STATE OF LOUISIANA
Respondent

AFFIDAVIT OF INDIGENCY

STATE OF LOUISIANA)
) SS
PARISH OF WEST FELICIANA)

Being first duly sworn, PETITIONER deposes and says as follows: I am the Petitioner in the above-entitled case; in support of my motion to proceed without being required to prepay fees, costs or give security therefore, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefore; and I believe I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of proceeding are true.

1. Are you presently employed? Yes ___ No ✓

a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

_____

b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received.

_____

_____

2. Have you received within the past 12 months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source?

		Yes	No
a.	Business, profession or form of self-employment?	___	✓
b.	Rent payments, interest, or dividends?	___	✓
c.	Pensions, annuities or life insurance payments?	___	✓
d.	Gifts of inheritances?	___	✓
e.	Any other sources?	___	✓

If the answer to any of the above is yes, describe each source of income, and state the amount received from each during the past twelve months.

_____

_____

3. Do you own any cash or checking or savings account?

$ Yes ✓ No ___ (include any funds in prison accounts)
23.59 PRISON ACCOUNT

If the answer is yes, state the total value of the items owned.

N/A

_____

_____

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary house-hold furnishings and clothing)?

Yes ___ No ✓

If the answer is yes, describe the property and state its approximate value.

_____

5. List the persons who are dependent upon you for support and state your relationship to those persons.

none

_____

_____

I declare under penalty of perjury that the foregoing is true and correct.

John L Sullivan
John L. Sullivan

Subscribed and sworn to before me
this 29 day of June, 1992.

James Arnold
Notary Public

AFFIDAVIT OF SERVICE BY U.S. MAIL

(SUP. CT. RULE 29.5(c))

92-5129 File

STATE OF MINNESOTA)
) SS
COUNTY OF HENNEPIN)

Tamara J. Byram, being first duly sworn on oath, deposes and states as follows:

1. That on the 8th day of July, 1992, she did send by United States mail, pursuant to Supreme Court Rule 29.3, a box properly sealed and with first class postage prepaid to:

Harry F. Connick, Esq.
District Attorney
619 S White ST
New Orleans LA 70119
(504) 822-2414
Attorney for Respondent State of Louisiana

three copies of Petitioner John L. Sullivan's Petition For A Writ Of Certiorari, a copy of John L. Sullivan's Motion to Proceed *In Forma Pauperis*, the supporting affidavit of John L. Sullivan, and the order in connection therewith.

2. All parties required to be served have been served.

Tamara Byram
Tamara J. Byram

Subscribed and sworn to before me
this 8th day of July, 1992.

Paula St Denis
Notary Public

PAULA M. ST. DENIS
NOTARY PUBLIC - MINNESOTA
SCOTT COUNTY
My Commission Expires Jan. 21, 1997

No. 92-5129

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1992

JOHN L. SULLIVAN,
Petitioner

vs.

STATE OF LOUISIANA,
Respondent

On Petition for a Writ of Certiorari
to the Supreme Court of the State of Louisiana

PETITION FOR A WRIT OF CERTIORARI

William J. Keppel
Counsel of Record
Michael J. Wahoske
Christopher J. Riley
Tamara J. Byram
Karen A. Fairbairn
DORSEY & WHITNEY
2200 First Bank Place East
Minneapolis, Minnesota 55402
Telephone: (612) 340-2600

John Wilson Reed
GLASS & REED
338 Lafayette Street
New Orleans, Louisiana 70130
Telephone: (504) 581-7635

Attorneys for Petitioner

QUESTION PRESENTED

IS A REASONABLE DOUBT INSTRUCTION, WHICH IS CONSTITUTIONALLY DEFICIENT UNDER CAGE V. LOUISIANA, 111 S. CT. 328 (1990), SUBJECT TO HARMLESS ERROR ANALYSIS?

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IN THE
SUPREME COURT OF THE UNITED STATES

No. _____

October Term, 1992

JOHN L. SULLIVAN,
Petitioner

vs.

STATE OF LOUISIANA,
Respondent

On Petition for a Writ of Certiorari
to the Supreme Court of the State of Louisiana

PETITION FOR A WRIT OF CERTIORARI

The petitioner John L. Sullivan respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of the State of Louisiana, which, on petitioner's direct appeal, affirmed the petitioner's conviction of first degree murder.

OPINIONS BELOW

The opinion of the Louisiana Supreme Court sought to be reviewed appears as Appendix A. This opinion was also reported at 596 So. 2d 177. The judgment and sentence of the Orleans Parish District Court appears as Appendix B. The Denial of Rehearing by the Supreme Court of Louisiana appears as Appendix C. The relevant pages of the trial transcript appear in Appendix D.

JURISDICTION

The Supreme Court of Louisiana rendered its decision on March 2, 1992, and denied petitioner's and respondent's separate petitions for rehearing on April 9, 1992. Jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the Constitution of the United States provides, in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . .

The Fourteenth Amendment to the Constitution of the United States provides, in pertinent part:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Louisiana Revised Statute section 14:30 reads today, in pertinent part, as it did at the time of the petitioner's trial:

> A. First degree murder is the killing of a human being:
> (1) When the offender has specific intent to kill or to inflict great bodily harm and is engaged in the perpetration or attempted perpetration of . . . armed robbery . . . .

La. Rev. Stat. Ann. § 14:30 (West 1979).

STATEMENT OF THE CASE

This case squarely raises the important issue of whether a constitutionally deficient reasonable doubt instruction may be harmless error. The Louisiana Supreme Court, along with other courts, have held such error harmless. Several other courts, however, have reversed convictions based on this error without engaging in a harmless error analysis. This Court should grant a writ of certiorari to the Louisiana Supreme Court to resolve this issue.

A. Course of Proceedings and Disposition Below.

Petitioner John L. Sullivan was convicted of first degree murder and sentenced to death after a trial in which the jury's instruction on reasonable doubt was constitutionally deficient under Cage v. Louisiana, 111 S. Ct. 328 (1990) (per curiam). On direct appeal from the trial court, the Supreme Court of Louisiana affirmed the conviction on March 2, 1992, holding that the instruction on reasonable doubt, though admittedly erroneous, was harmless error.1/ App. A. The court did find, however, that petitioner's appointed trial counsel, having totally

1/ The court also rejected petitioner's claims that the state failed to produce exculpatory evidence under Brady v. Maryland, 373 U.S. 83 (1963), and that the trial court improperly instructed the jury to presume specific intent, in violation of petitioner's due process rights under Sandstrom v. Montana, 442 U.S. 510 (1979).

failed to prepare for the penalty phase of trial, was ineffective at the penalty stage; it thus vacated the sentence, remanding for a new sentencing hearing.2/ The Louisiana Supreme Court denied petitioner's and respondent's applications for rehearing on April 9, 1992. App. C. This petition is from the Louisiana Supreme Court's affirmance of petitioner's direct appeal of his conviction.3/

B. Statement of the Facts.

Petitioner was convicted of killing Joe King, a regular patron of a New Orleans bar, the C-Note Lounge. At about 4:00 A.M. on April 14, 1980, two men entered the barroom. They ordered drinks from the barmaid, Stephanie Lowery, and one of them shot a game of pool with King. When the game was over, one of them pulled out a sawed-off shotgun and discharged a single shot at close range, killing King. Together, the two strangers at gunpoint took a watch from a customer

2/ At the remanded sentencing proceeding, the only two choices available to the jury, and to the court, will be life imprisonment without parole or the death penalty. La. Code Crim. Proc. Ann. arts. 905.6 & 905.8 (West 1976).

3/ Despite the time that has passed since petitioner's trial, the Court should be aware that this case is on direct, not collateral, review. The Louisiana court's decision on direct appeal followed several post-trial motions. First, petitioner filed a pro se motion for a new trial, which was denied. Prior appointed counsel also filed a motion for a new trial, which was denied after an evidentiary hearing in 1987. In January 1990, the Louisiana Supreme Court ordered the case remanded to determine whether the state had failed to disclose an initial description of the perpetrator inconsistent with the actual appearance of the defendant; and second, whether defense counsel had rendered effective assistance at the penalty phase. The issue raised in this petition for certiorari is squarely presented by the record and has been raised at the first opportunity for review by this Court.

named Legorretta and the contents of the cash register, about $150, from Lowery. They then fled.

About noon that same morning, at the Playgirl Lounge about a mile distant, the police arrested Michael Hillhouse and the petitioner John Sullivan. Hillhouse had $53.00 in his pockets and was wearing clothing said to match that of one robber--light colored pants and a plaid shirt; he was also wearing a pinstriped vest. Sullivan had $86.00; he was clothed in blue jeans and on his wrist was a watch similar in color to that taken from Legorretta.4/ In the course of that same afternoon, Hillhouse led the police to a nearby residence, said by Hillhouse to be that of Sullivan's "wife"; there the police recovered a black flight bag and a blue pinstriped suit jacket matching the vest worn by Hillhouse at the time of his arrest, as well as a sawed-off shotgun. Hillhouse also gave a statement acknowledging his participation in the crime but identifying a companion named "Bub" as the triggerman. While in custody that day, Hillhouse suffered injuries serious enough to require hospital treatment.

There was no scientific or forensic evidence connecting John Sullivan either with the offense generally or with the shooting specifically. Police removed the perpetrators' beer cans from the scene, but no fingerprints were introduced into evidence at trial. Police officers testified that they made no attempt to lift fingerprints. Similarly, the state introduced no fingerprints from the recovered

---

4/ Legorretta did not testify, and although Hillhouse claimed that Sullivan had taken the watch in the robbery, Hillhouse could not positively identify it.

weapon or a car that Hillhouse said was used; again the state apparently made no attempt to lift any. A police officer trained in ballistics testified at trial that markings on the slug removed from King's body matched those found on a test slug that the police fired from the weapon recovered from Sullivan's girlfriend's apartment. A convicted burglar, granted full immunity for his wrongs, Hillhouse fully incriminated Sullivan at trial. Claiming to have met Sullivan only five or six hours earlier, he said that Sullivan had the idea; that Sullivan recruited him; that Sullivan had the gun; that Sullivan did the deed; and that Sullivan had then left him for a while, but thereafter returned and took him by the house of Sullivan's "wife" where he saw the weapon eventually seized by the police, and where Hillhouse said he borrowed a pinstriped vest, matching a jacket seized by the police. Hillhouse explained that the plan was hatched at another bar, the Polka Dot Lounge, four blocks from the C-Note, where, he said, his accomplice obtained the weapon from behind the bar; and where, Hillhouse further said, the two of them returned after the robbery and shooting.

Within days of the killing, Lowery viewed a line-up which included Hillhouse and Sullivan. At the conclusion of the line-up, she told the police that she could make no identification. A week later, Lowery was summoned again, this time into the privacy of the district attorney's office. There, as she subsequently explained it, viewing a 5 X 7 black and white photograph of the line-up in "less stressful" surroundings, she identified Hillhouse and Sullivan, naming Sullivan as the triggerman. She restated that identification at trial.

On cross-examination, however, Lowery admitted that at the line-up, in her mind she picked two people other than Hillhouse and Sullivan, but said nothing of that to the police because she was afraid of making a wrong identification. She explained that she picked Hillhouse and Sullivan from the photograph only after she studied it for about fifteen minutes.5/

Thus, as the case went to the jury, the state relied principally on Michael Hillhouse, who was totally immunized, and Stephanie Lowery, with her serious difficulties making an identification. Petitioner vigorously argued to the jury that the state failed to prove guilt beyond a reasonable doubt. The court gave the following instruction on reasonable doubt:

5/ The defense was greatly hamstrung by the state's failure to produce to petitioner an initial incident report prepared by the police the day of the offense, which contains Lowery's initial description of the triggerman as a man with straight shoulder length hair and a mustache. That description was tangibly inconsistent with petitioner's appearance, clean-shaven with short curly hair, at the time of his arrest hours after the offense. Petitioner's new counsel obtained a copy of the report long after his trial when such reports became available to the public. See La. Rev. Stat. Ann. § 44:3(4)(a) (amended in 1984). Lowery's description in the initial police report also matches a photograph of George Simp, a/k/a William O. Williams or "Cookie," obtained by trial counsel prior to trial. Lacking Lowery's initial description of the triggerman, trial counsel did not appreciate the significance of the photograph. However, armed with the initial description, present counsel obtained testimony seriously implicating Cookie in this offense. In summary, police records show that Cookie gave the Polka Dot Lounge--the bar where, according to Hillhouse, the perpetrator obtained the gun and hatched the scheme--as his place of residence. Several witnesses recounted admissions against criminal interest in which Cookie implicated himself in the C-Note killing. Although the Louisiana Supreme Court held this evidence immaterial under Brady v. Maryland, 373 U.S. 83 (1963), it would nonetheless be available in a subsequent trial if petitioner's conviction is reversed based on the Cage error.

> If you entertain any reasonable doubt as to any fact or element necessary to constitute the defendant's guilt, it is your sworn duty to give him the benefit of that doubt and return a verdict of acquittal. Even where the evidence demonstrates a probability of guilt, yet if it does not establish it beyond a reasonable doubt, you must acquit the accused. This doubt must be a reasonable one; that is, one founded upon a real, tangible, substantial basis, and not upon mere caprice, fancy or conjecture. It must be such a doubt as would give rise to a grave uncertainty, raised in your minds by reason of the unsatisfactory character of the evidence; one that would make you feel that you had not an abiding conviction to a moral certainty of the defendant's guilt. If, after giving a fair and impartial consideration to all of the facts in the case, you find the evidence unsatisfactory upon any singel [sic] point indispensably necessary to constitute the defendant's guilt, this would give rise to such a reasonable doubt as would justify you in rendering a verdict of not guilty.
>
> A reasonable doubt is not a mere possible doubt. It should be an actual or substantial doubt. It is such a doubt as a reasonable person would seriously entertain. It is a serious doubt, for which you could give good reason.

App. D at D-29-30.

Appointed trial counsel failed to object to this erroneous instruction at trial. However, the lack of contemporaneous objection did not bar the Louisiana Supreme Court from reviewing the issue on direct appeal under the Louisiana Code of Criminal Procedure. La. Code Crim. Proc. Ann. art. 905.9 (West 1976). Petitioner's current appellate counsel raised and briefed this precise issue on direct appeal to the Louisiana Supreme Court, arguing not only that the instruction was constitutionally defective, but also that a defective reasonable doubt instruction is not subject to harmless error analysis. Original Brief of Appellant at 56 & n.58. The Louisiana Supreme Court reached the issue on the merits, holding that the jury instruction violated Cage but that it was harmless error, relying on its opinion in Louisiana v. Cage, 583 So. 2d 1125 (La.), cert. denied, 112 S. Ct. 211 (1991), for its

holding that harmless error analysis was acceptable here. App. A at A-11. Without conceding the other issues raised and decided on direct appeal, petitioner brings this issue to the Court.

REASONS FOR GRANTING THE WRIT

THE LOUISIANA SUPREME COURT'S APPLICATION OF A HARMLESS ERROR TEST TO A CONSTITUTIONALLY DEFICIENT REASONABLE DOUBT INSTRUCTION DISREGARDS THIS COURT'S RULINGS ON FUNDAMENTAL ERROR, VIOLATES PETITIONER'S SIXTH AMENDMENT RIGHT TO A JURY TRIAL, AND CONFLICTS WITH DECISIONS BY LOWER FEDERAL COURTS AND STATE COURTS.

A. The Louisiana Supreme Court's application of a harmless error test to an erroneous reasonable doubt instruction highlights a conflict in the jurisdictions which this Court should resolve.

The Louisiana Supreme Court found petitioner's reasonable doubt instruction constitutionally impermissible under Cage v. Louisiana, 111 S. Ct. 328 (1990) (per curiam). It then, however, found the error harmless. App. A at A-11.6/ Other state courts have also applied harmless error analysis to this type of error. See, e.g., Missouri v. Massey, 817 S.W.2d 624 (Mo. Ct. App. 1991) (prosecutor improperly defined reasonable doubt during voir dire; court found that evidence did not "overcome" error); Massachusetts v. Garcia, 399 N.E.2d 460, 471-72 (Mass. 1980). The Court of Appeals for the Tenth Circuit also applies harmless error analysis. See Monk v. Zelez, 901 F.2d 885, 890 (10th Cir. 1990) (per curiam) (instruction defining reasonable doubt as "substantial" doubt erroneous; harmless

6/ See also Louisiana v. Cage, 583 So. 2d 1125 (La. 1991), cert. denied, 112 S. Ct. 211 (1991) (harmless error); Louisiana v. Smith & Scire, No. 89-KA-0001, 1992 WL 112102 (La. May 26, 1992) (not harmless error).

error analysis applied); accord United States v. Pinkney, 551 F.2d 1241, 1245 (D.C. Cir. 1976).

In contrast, the Supreme Court of South Carolina has overruled a conviction based on Cage error without subjecting the record to harmless error analysis. South Carolina v. Manning, 409 S.E.2d 372, 374-75 (S.C. 1991), cert. denied, 112 S. Ct. 1282 (1992); see also Oregon v. Williams, 828 P.2d 1006, 1023 (Or. 1992) (Unis, J., dissenting) (majority found no Cage error; dissent finds error and concludes harmless error should not apply). Likewise, the Court of Appeals for the Fifth Circuit overruled a conviction based on an erroneous reasonable doubt instruction without considering harmless error. United States v. Alvero, 470 F.2d 981, 983 (5th Cir. 1972) ("substantial doubt" instruction).7/

The Courts of Appeals for the First and Second Circuits have also indicated their support for this view. Lanigan v. Maloney, 853 F.2d 40, 48-49 (1st Cir. 1988) (dicta), cert. denied, 488 U.S. 1007 (1989); Perez v. Irwin, Nos. 580, 91-2356, 1992 WL 44920 (2d Cir. Mar. 11, 1992) (dicta). In Lanigan, the First Circuit found the reasonable doubt instruction constitutionally defective, but the court declined to rule on the issue of whether harmless error applied. It felt compelled to state, however:

7/ The district court in Skelton v. Smith denied a petition for habeas corpus on abuse of the writ grounds, but in the alternative, ruled that any Cage error was harmless. Skelton v. Smith, No. 90-0639, slip op. (E.D. La. Dec. 7, 1990). The Fifth Circuit affirmed the decision without reaching the Cage issue. Skelton v. Whitley, 950 F.2d 1037 (5th Cir. 1992), petition for cert. filed, (U.S. Mar. 30, 1992) (No. 91-7784).

> We continue to have serious doubts whether a conviction obtained without a proper reasonable doubt instruction could ever be upheld; we are certain that this is not the unusual case in which to do so. We draw this conclusion from Supreme Court precedent and from our understanding of the role played by the jury in the criminal trial process.

853 F.2d at 48. After analyzing in depth why harmless error should not apply under this Court's precedents, the First Circuit ruled that, even if that analysis were applied, the error was not harmless. Id. at 49-50. Similarly, in Perez, the Second Circuit also declined to reach the issue of applying harmless error, but pointed out in dicta that "[t]he right of a defendant not to be convicted except upon proof beyond a reasonable doubt as to his guilt is so fundamental that it is difficult to fathom how an instruction seriously misinforming the jury as to the reasonable doubt standard may ever be deemed harmless." Perez, 1992 WL at 44920, *4 (citing Jackson, 443 U.S. at n.14).8/

Thus, if petitioner had been tried in South Carolina, his conviction would have been overruled automatically. There is little doubt this would also have been the case if petitioner had been tried in the First or Second Circuits. Moreover, Louisiana's application of harmless error analysis conflicts with the Fifth Circuit's

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8/ Even though the court applied a "harmless error test," it was not a true Chapman test since it found the error not harmless merely by examining the instructions given to the jury. Compare Smith v. Tennessee, 547 S.W.2d 925 (Tenn. 1977), cert. denied, 434 U.S. 849 (1977) (error harmless examining only other instructions). Certainly in this case, coupled with an instruction that directed the jury to presume intent, the erroneous reasonable doubt instruction was not harmless.

decision in United States v. Alvero, 470 F.2d 981 (5th Cir. 1972). Only this Court can settle the law on this disparity in the scope of an accused's constitutional rights.9/

9/ It is true that this Court has previously denied petitions on this issue. The recurring nature of the issue, however, combined with its fundamental importance, shows that it is worthy of this Court's review. Moreover, this case presents the issue more squarely than did those on which this Court has denied review in the past. In Cage v. Louisiana, for example, the petitioner did not raise a colorable claim of innocence; indeed, petitioner did not argue that if harmless error analysis were applied to his case the result would be any different. See Petition for a Writ of Certiorari, Cage v. Louisiana, 112 S. Ct. 211 (1991) (No. 91-5077). Here, the record supports petitioner's claim of innocence. See discussion infra at 23.

Furthermore, it is not merely defendants who are seeking this Court's clarification of the law on this question. The government has also unsuccessfully petitioned the Court on this issue. In Manning, the state requested certiorari on the issues of whether a reasonable doubt instruction was erroneous and, if so, whether the error was subject to harmless error analysis. See Petition for Writ of Certiorari, South Carolina v. Manning, 112 S. Ct. 1282 (1992) (No. 91-1148). However, the Cage issue was not squarely presented to this Court because the instruction itself was admittedly less egregious than in Cage, see id. at 16-32; Brief in Opposition to Petition for Writ of Certiorari, Manning, at 2, and the error was compounded by a defective circumstantial evidence instruction; the subsidiary issue of whether harmless error applies was barely briefed. See Petition for Writ of Certiorari, Manning, at 33-34. Similarly, the government unsuccessfully petitioned for certiorari in Lanigan, which pre-dated Cage but dealt with an erroneous instruction on the reasonable doubt standard. As opposed to these two cases, petitioner's case squarely presents the harmless error issue to this Court because both sides--and the Louisiana Supreme Court--agree that petitioner's instruction violated Cage. App. A at A-10.

The defendant in Skelton v. Whitley, 950 F.2d 1037 (5th Cir. 1992) (No. 91-7784), has also filed a petition for certiorari on this issue. However, the issue of whether harmless error applies to a Cage error was not addressed in the Fifth Circuit's opinion and the district court's treatment of the issue is dicta. Instead, the main issues in that case, on collateral review, are the standard for abuse of the writ and the retroactivity of Cage under Teague v. Lane, 489 U.S. 288 (1989). See Petition for Writ of Certiorari, Skelton v. Smith (No. 91-7784). Petitioner respectfully suggests that this case presents the issue more precisely and squarely to this Court.

B. The Louisiana Supreme Court's Application of the Harmless Error Test to a *Cage* Error is Contrary to the Principles of this Court's Rulings Concerning Fundamental Error.

In Chapman v. California, 386 U.S. 18, 22-24 (1967), this Court concluded that certain federal constitutional errors may be harmless and therefore do not require automatic reversal. Harmless error analysis, however, is appropriate only in instances which, although a constitutional violation occurred, the violation does not "render a trial fundamentally unfair." Rose v. Clark, 478 U.S. 570, 577 (1986); see Chapman, 386 U.S. at 24. If a constitutional violation affects the fundamental fairness of the trial, then the violation is not subject to harmless error analysis, and automatic reversal of the conviction is required. Rose, 478 U.S. at 577. Thus, this Court excludes from harmless error analysis any violations of the mandate in In re Winship, 397 U.S. 358, 364 (1970), which protects the accused against conviction of an offense "except upon proof beyond a reasonable doubt." See, e.g., Mullaney v. Wilbur, 421 U.S. 684 (1975); Cool v. United States, 409 U.S. 100 (1972) (per curiam).

In Winship, this Court reversed a juvenile's conviction obtained on a preponderance of the evidence standard without applying harmless error analysis. As the Court explained, the government's duty to establish guilt beyond a reasonable doubt is "a requirement and a safeguard of due process," 397 U.S. at 362 (quoting Leland v. Oregon, 343 U.S. 790, 802-03 (1952) (Frankfurter, J., dissenting)), and is "implicit in 'constitutions [which] recognize the fundamental principles that are deemed essential for the protection of life and liberty.'" Id. (quoting Davis v. United States, 160 U.S. 469, 488 (1895)). Because the reasonable doubt standard is

"indispensable to command the respect and confidence of the community in applications of criminal law," the Court must carefully guard against dilution of that standard. Id. at 364. An erroneous reasonable doubt instruction cannot be harmless error under Rose because it violates fundamental fairness and undermines the reliability of the trial's outcome.

In Jackson v. Virginia, 443 U.S. 307, 316 (1979), this Court, calling the reasonable doubt standard "an essential of the due process guarantee," wrote:

> Our cases have indicated that failure to instruct a jury on the necessity of proof of guilt beyond a reasonable doubt can never be harmless error. Thus, a defendant whose guilt was actually proved by overwhelming evidence would be denied due process if the jury was instructed that he could be found guilty on a mere preponderance of the evidence.

Id. at 320 n.14 (citing Cool, 409 U.S. at 100) (emphasis added) (citations omitted). Likewise, in Connecticut v. Johnson, 460 U.S. 73, 90 (1983), four Justices stated in dissent that an instruction that could "never be harmless" is "an instruction that fails to inform the jury that it must find guilt beyond a reasonable doubt." Id. at 97 n.6 (Powell, Rehnquist and O'Connor, JJ., and Burger, C.J., dissenting). Justice Blackmun's plurality opinion implicitly adopts this view in holding that an instruction that lessened or shifted the state's burden of proof could never be harmless error. See id. at 73, 86 (Blackmun, J., joined by Brennan, White and Marshall, JJ.).10/ The same fundamental fairness question--the requirement of

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10/ See also United Brotherhood of Carpenters & Joiners v. United States, 330 U.S. 395, 410 (1947) ("[W]here the evidence against an accused charged with a crime is well-nigh conclusive and the court fails to give the reasonable-doubt instruction . . . [i]t could not be said that the failure was harmless error.").

proof beyond a reasonable doubt as an absolute requisite for conviction--underlies this Court's opinion in Cage.11/ This Court has also recently reaffirmed this aspect of Jackson in Arizona v. Fulminante, 111 S. Ct. 1246, 1255 (1991) (White, Marshall, Blackmun, and Stevens, JJ., dissenting, pointing out the continuing validity of Jackson in the majority opinion).

Notably, Jackson also indicates that an erroneous reasonable doubt instruction renders review of the record meaningless. In Jackson, this Court set forth the proper analysis for the issue of insufficient evidence to support a conviction, holding that, "[a]fter Winship the critical inquiry on review of the sufficiency of the evidence to support a criminal conviction must be not simply to determine whether the jury was properly instructed, but to determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt." 443 U.S. at 318 (emphasis added). In context, it is clear that the "properly instructed" language specifically refers to a reasonable doubt instruction. See id. at 316-17, 320 n.14. Thus, without a constitutional instruction on the reasonable doubt standard, any review of the record is pointless.

11/ This Court framed the issue regarding the jury instructions in Cage as "whether the reasonable doubt instruction in this case complied with Winship." 111 S. Ct. at 329. After this Court remanded Cage, the Louisiana Supreme Court found that the instruction was subject to harmless error analysis and ruled the error harmless. Louisiana v. Cage, 583 So. 2d 1125 (La. 1991). This Court then denied certiorari review on the question of whether harmless error analysis can apply to an unconstitutional instruction on the reasonable doubt standard, 112 S. Ct. at 211, but see the discussion thereof at n.9, p. 12 of this Petition, supra.

That a Cage error cannot be subject to harmless error analysis is also supported by Rose v. Clark, 478 U.S. 570 (1986). There, this Court determined that an erroneous jury instruction regarding the presumption of intent was subject to harmless error analysis; as long as the jury could still consider the issue of intent, the erroneous instruction would not necessarily contribute to a finding of guilt. Id. at 580. As this Court explained, "[b]ecause a presumption does not remove the issue of intent from the jury's consideration, it is distinguishable from other instructional errors that prevent a jury from considering the issue." Id. at 580 n.8 (citing Jackson). By contrasting burden-shifting instructions, which could be subject to harmless error analysis, with errors in instructing the jury on the reasonable doubt standard, id., this Court indicated that the latter are not subject to the harmless error test.

C. An Erroneous Reasonable Doubt Instruction is a "Structural Defect" under *Arizona v. Fulminante.*

Arizona v. Fulminante, 111 S. Ct. 1246, 1264-65 (1991), distinguishes between "trial errors," which are subject to harmless error analysis; and "structural defects," which "defy analysis by 'harmless-error' standards." Trial errors are those "which occur[] during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt." Id. at 1264 (emphasis added). A structural defect, which is not subject to harmless error analysis, is one which affects the "framework within which the trial proceeds, rather than simply an error in the trial process itself." Id. at 1265. Structural errors are those which deprive a defendant of "basic protections [without which] a criminal

trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair." Id. (quoting Rose, 478 U.S. at 577-78).

This Court's opinions teach that an error in a reasonable doubt instruction is a structural error which is, therefore, not subject to harmless error analysis. See Jackson, 443 U.S. at 320 n.14; cf. Fulminante, 111 S. Ct. at 1253-55 (White, J., joined by Marshall, Blackmun and Stevens, JJ.) (omission of reasonable doubt instruction creates risk jury will convict defendant even if state has not met burden of proof). An unconstitutional reasonable doubt instruction affects the very framework of a trial by giving the jury an erroneous standard with which to evaluate the evidence. The jury's verdict is unreliable because the erroneous instruction skews the outcome in favor of conviction. As such, it is a structural defect not subject to harmless error analysis as defined by this Court in Fulminante. See Oregon v. Williams, 828 P.2d 1006, 1023, 1031 (Or. 1992) (Unis, J., dissenting).

Unlike trial errors, such as the erroneous admission of evidence, an erroneous instruction on reasonable doubt cannot be excised and the remainder of the trial assessed. Indeed, if one excises the erroneous instruction the result is precisely that found unconstitutional in Jackson--a failure to instruct on reasonable doubt. See 443 U.S. at 320 n.14. The difficulty in assessing the level of harm of a constitutional error in a trial is one of the most important factors in determining the inapplicability of the Chapman harmless error rule. Fulminante, 111 S. Ct. at 1265 (structural errors are those that "defy analysis by 'harmless-error' standards");

see Satterwhite v. Texas, 486 U.S. 249, 256 (1988) ("Since the scope of a violation . . . cannot be discerned from the record, any inquiry into its effect on the outcome of the case would be purely speculative."). Thus, the impossibility of reviewing an "excised" record demonstrates that an erroneous reasonable doubt instruction cannot be harmless.

This point is buttressed by the difficult and subjective nature of the harmless error analysis applied to a reasonable doubt instruction error. Any attempt to determine whether such error is harmless would place the reviewing court in the impossible position of conducting a "subjective enquiry into the jurors' minds," Yates v. Evatt, 111 S. Ct. 1884, 1893 (1991), for without the proper standard of proof, the trial record is devoid of any "facts" that can reliably be said to have been properly "found" by the jury. See Carella v. California, 491 U.S. 263, 267 (1989) (Scalia, J., concurring) ("In the usual case the harmlessness determination requires consideration of 'the trial record as whole,' in order to decide whether the fact supported by improperly admitted evidence was in any event overwhelmingly established by other evidence." (quoting United States v. Hasting, 461 U.S. 499, 509 (1983))); Pope v. Illinois, 481 U.S. 497, 503 n.6 (1987) (An erroneous instruction is harmless if "facts found by the jury were such that it is clear beyond a reasonable doubt that if the jury had never heard the impermissible instruction its verdict would have been the same.").12/ Since the reviewing court cannot confidently

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12/ See also Tennessee v. Bobo, 814 S.W.2d 353, 358 (Tenn. 1991) ("It is impossible to say that the remaining eleven jurors would be capable of disregarding their prior deliberations . . . ."); Massachusetts v. Kelleher, 482 N.E.2d 804, 808

assess the likelihood that the error affected the jury's decision, Holloway v. Arkansas, 435 U.S. 475, 491 (1978), harmless error analysis is not appropriate.

At a more fundamental level this case reveals the difficulty of applying the Fulminante test, which Justice White characterized as a "meaningless dichotomy between 'trial errors' and 'structural defects' in the trial process." See 111 S. Ct. at 1254 (White, J., with Marshall, Blackmun and Stevens, JJ.). The Louisiana Supreme Court relied on its decision in Louisiana v. Cage, 583 So. 2d 1125 (La. 1991), to hold in this case that the error was subject to a harmless error analysis. See App. A at A-10-11. In Cage, the court determined, with no other apparent analysis, that the erroneous reasonable doubt instruction was "trial error" under Fulminante because the instruction "was given by the trial judge to the jury during the guilt phase of defendant's trial." See 583 So. 2d at 1127. The court gave no evident consideration to the systemic effect of the error on the trial. The Colorado Court of Appeals also expressed difficulty applying Fulminante in Colorado v. Naranjo, 821 P.2d 836 (Colo. Ct. App.), cert. granted, (No. 89CA938) (Colo. Dec. 23, 1991). In that case, the court chose to resolve the issue under the Colorado Constitution, claiming an inability to conclude whether denial of a defendant's right to testify is subject to a Chapman harmless error analysis. See id. at 838; see also Brooks v. United States, 599 A.2d 1094, 1101 (D.C. 1991) ("It is well settled that constitutional error is subject to

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(Mass. 1985) ("We cannot assume that our view of the credibility of the victim[s] would be the same as that of the jurors." (alteration in original) (quoting Massachusetts v. Wood, 404 N.E.2d 1223 (Mass. 1980))).

harmless error analysis."). Thus, this case presents an opportunity to develop the Fulminante test.

D. The Application of Harmless Error Analysis to a *Cage* Error Violates Petitioner's Sixth Amendment Right to a Trial by Jury.

Not only is an appellate court's determination of what facts were proved beyond a reasonable doubt at trial impermissibly speculative; it also violates the petitioner's Sixth Amendment right to have a jury determine his guilt. As Justice Scalia explained in his concurring opinion in Carella, a court's post hoc factual determination that a defendant is nonetheless guilty is equivalent to issuing a directed verdict of guilt, which is clearly forbidden:

> [Error] would not be cured by an appellate court's determination that the record evidence unmistakably established guilt, for that would represent a finding of fact by judges, not by a jury. As with a directed verdict, "the error in such a case is that the wrong entity judged the defendant guilty."

491 U.S. at 269 (emphasis in original) (quoting Rose, 478 U.S. at 578); see also United States v. Martin Linen Supply Co., 430 U.S. 564, 572-73 (1977); Duncan v. Louisiana, 391 U.S. 145 (1968); Henry Monaghan, Harmless Error and the Valid Rule Requirement, 1989 Sup. Ct. Rev. 195, 200 (1989) ("[S]pecial concern exists that judicial toleration of harmless error is not a license for judicial invasion of the issue-resolving province constitutionally reserved to the jury."). As Justice Scalia points out, "'the question is not whether guilt may be spelt out of a record, but whether guilt has been found by a jury according to the procedure and standards appropriate for criminal trials.'" Carella, 491 U.S. at 269 (quoting Bollenbach v. United States, 326 U.S. 607, 614 (1946)). A defendant has the right to a jury determination of his

guilt according to the Winship standard of proof "even when the evidence against him is so overwhelming as to establish guilt beyond a reasonable doubt." Id. at 268; see also Jackson, 443 U.S. at 316-18 (the threshold query in a "sufficiency of the evidence" determination is whether the jury was instructed correctly on reasonable doubt).

A majority of this Court discussed this constitutional defect in Rose v. Clark. Citing Martin Linen Supply, which held that a judge may not direct a guilty verdict no matter how overwhelming the evidence of guilt, the Court noted that any usurpation of the jury function of determining guilt cannot be subject to harmless error. 478 U.S. at 578. Because a defendant is entitled to have a jury determine his guilt beyond a reasonable doubt under Winship, for a court to apply a harmless error analysis to this type of error would be an impermissible usurpation of the jury function. See id. 13/

13/ Chief Justice Calogero of the Louisiana Supreme Court emphasized this point in his dissenting opinion in Cage on remand from this Court:

> Because of his right to trial by jury, defendant is entitled to have the jury decide his fate, properly instructed that they must find him guilty only if proven so beyond a reasonable doubt. . . . Can this Court now say that there was sufficient evidence for a jury to find defendant guilty beyond a reasonable doubt . . . . If we can say that, then this Court has become the jury in this case, and we would just as soon acknowledge that this defendant and others in similar circumstances have a constitutional right to trial by jury except if the trial judge does not afford them one.

583 So. 2d at 1130 (Calogero, C.J., dissenting) (emphasis in original).

The First Circuit adopted this view in Lanigan v. Maloney, pointing out that affirming a conviction in the face of a defective reasonable doubt charge is the "qualitative equivalent of directing a verdict for the prosecution" because determining the weight of the evidence is the jury's task. 853 F.2d at 49 (citing Martin Linen Supply); see also Perez v. Irwin, Nos. 580, 91-2356, 1992 WL 44920, at *4 (2d Cir. Mar. 11, 1992). Since the Louisiana Supreme Court did apply a harmless error test in the face of an erroneous instruction on reasonable doubt, thereby invading the sole province of the jury, its opinion should be reviewed by this Court and, ultimately, reversed.

E. Even if Harmless Error Analysis Does Apply to a *Cage* Error, the Louisiana Supreme Court Did Not Apply the Proper Test.

As Justice Dennis points out in his dissent below, the majority of the Louisiana Supreme Court held this error to be harmless without applying a Chapman harmless error test. App. A at A-22. Instead of inquiring whether there was a "reasonable possibility" that the error contributed to the conviction and requiring the state to prove beyond a reasonable doubt that it did not, Chapman, 386 U.S. at 24, the court considered all of the evidence in the light most favorable to the state, assumed Hillhouse's total credibility, and held that "the erroneous instruction could not have affected the jury's deliberation." App. A at A-11. This consideration is not that described in Chapman; it is equivalent to a Jackson v. Virginia sufficiency of the evidence standard. See Jackson, 443 U.S. at 319. Not only does the Chapman inquiry differ from a Jackson analysis in the questions it asks, but also in the burden of proof; in a Chapman analysis, the beneficiary of the error--the state--has the

burden of proving that the error did not affect the outcome. Chapman, 386 U.S. at 24.

The evidence of John Sullivan's guilt of any crime, particularly the capital crime of first degree murder, was far from "overwhelming." A properly instructed jury would have had several reasons to discredit Hillhouse's testimony that petitioner fired the fatal shot: Besides his total immunity, his initial statement to the police made no mention of John Sullivan, only of "Bub." There was testimony that Hillhouse required medical treatment following his interrogation by police, after which he fingered Sullivan in exchange for immunity. Even if the jury chose to believe Hillhouse as to the identity of the triggerman, his testimony also suggested lack of the specific intent necessary for capital murder in that he testified that there had been no prior plan to murder and that the killing came as a surprise. The state's only other witness from the scene of the crime was Lowery, who testified that she did not see the shooting itself or who pulled the trigger. Lowery, of course, was seriously impeached by her failure to identify petitioner at the initial line-up and her initial thought that two other men were involved. The state also presented circumstantial evidence that associated John Sullivan with Hillhouse, but only after the crime.14/ On the record presented, the Louisiana Supreme Court's holding that

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14/ This Court has also warned of the need to have a heightened scrutiny in the application of the harmless error rule in capital punishment cases, such as this one. Satterwhite v. Texas, 486 U.S. 249, 258 (1988). Although petitioner's death sentence was vacated, petitioner may still be sentenced to death on retrial. Accordingly, the irrevocability of the potential judgment in this case requires every possible doubt to be resolved in favor of the petitioner. Here, the belated Brady disclosure has resulted in evidence that plausibly

the error was harmless beyond a reasonable doubt was incorrect under a proper Chapman analysis.

In cases such as this, where identity and credibility issues predominate, an erroneous reasonable doubt instruction is especially not harmless. In Louisiana v. Cage, by contrast, Cage admitted firing the gun and four witnesses identified Cage, three of whom saw him fire the shot. See 583 So. 2d at 1128. Similarly, in Massachusetts v. Garcia, 399 N.E.2d 460 (Mass. 1980), the court applied harmless error analysis to an erroneous reasonable doubt instruction and found the error harmless, writing, "[t]he reasonable doubt standard is most crucial in cases where central facts (such as identity, or the occurrence of an event) are at issue, and credibility plays a key role." Id. at 473. In reviewing the record, the court noted that the defendant had confessed and several eyewitnesses had testified; the only issue for the jury was whether the defendant had established self-defense. Since there were no "identity or credibility issues," the court found the erroneous instruction harmless. By contrast, in Lanigan, 853 F.2d at 50, the First Circuit wrote "where the Commonwealth's case rested substantially on the credibility of the alleged victim, we cannot say that the errors in the reasonable doubt instruction were harmless beyond a reasonable doubt." Accord Monk v. Zelez, 901 F.2d 885, 890 (10th Cir. 1990) (per curiam) (error not harmless where state's case rested on circumstantial

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demonstrates that Sullivan was not the culprit at all, which evidence will be available for use before a properly instructed jury if this Court ultimately reverses the conviction and orders a new trial on remand.

evidence); United States v. Pinkney, 551 F.2d 1241, 1245 (D.C. Cir. 1976) (not harmless where evidence equivocal and credibility an issue).

Petitioner's entire case rested on the state's failure to prove guilt beyond a reasonable doubt. Petitioner's trial counsel strenuously argued credibility issues to the jury. Even if a harmless error analysis may constitutionally be applied to a defective reasonable doubt instruction, which is especially doubtful in identity or credibility cases, it must be a true Chapman analysis. As the dissent below has noted, that did not occur here.

CONCLUSION

This case squarely presents the issue whether the failure to instruct the jury properly regarding reasonable doubt may be excused as harmless error. That an error of such fundamental constitutional magnitude simply may not ever be regarded as harmless is compelled by the logic of this Court's opinions. This Court should resolve this issue to avoid further divergence between courts on such a core constitutional concept, and to avoid further misreading of this Court's Fulminante decision as allowing an error of this type to be mischaracterized as "merely" trial error. Moreover, a proper reasonable doubt instruction is all the more crucial in this case given the identity and credibility issues that must be resolved by the jury. These issues will be even more stark in a retrial, where petitioner will have the benefit of the previously withheld initial description and the evidence uncovered as a result thereof. For the reasons stated herein, petitioner urges the Court to grant the Writ of Certiorari.

Respectfully submitted,

William J. Keppel by cgk

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William J. Keppel
Counsel of Record
Michael J. Wahoske
Christopher J. Riley
Tamara J. Byram
Karen A. Fairbairn
DORSEY & WHITNEY
2200 First Bank Place East
Minneapolis, Minnesota 55402
Telephone: (612) 340-2600

John Wilson Reed
GLASS & REED
338 Lafayette Street
New Orleans, Louisiana 70130
Telephone: (504) 581-9065

Attorneys for Petitioner

596 So. 2d 177

STATE of Louisiana

v.

John L. SULLIVAN
No. 87-KA-0027

Supreme Court of Louisiana
March 2, 1992

COLE, Justice.

Defendant John Sullivan was convicted by a jury of the first degree murder, during the perpetration of an armed robbery at a New Orleans bar, of Joseph King, a bar patron. The jury subsequently recommended imposition of the death penalty, a recommendation with which the trial court agreed. Sullivan now appeals both the conviction and the sentence on a myriad of grounds. For the reasons which follow, we affirm the conviction but vacate the death sentence and remand to the trial court for a new sentencing proceeding.

I.

On the evening of April 13, 1980, defendant Sullivan was in the Polka Dot Lounge on St. Charles Avenue in New Orleans. At about 10:30 p.m., Michael Hillhouse, who had arrived in New Orleans a few days earlier, entered the bar and began drinking beer. Sullivan introduced himself to Hillhouse, and the two continued talking and drinking. Sullivan asked Hillhouse if he wanted to make some quick money, and Hillhouse affirmed that he did so desire. Sullivan retrieved a black vinyl bag from behind the bar and returned to the table. He showed Hillhouse the bag which contained a sawed-off shotgun, and Hillhouse agreed to commit an armed robbery with Sullivan.

At about 3:30 a.m., April 14, they left the bar and drove to the C-Note Lounge, also on St. Charles Avenue. They entered the lounge, went to the far end of the bar, and ordered beers. Hillhouse decided to play pool but had only a quarter, and the table required fifty cents. Joseph King, a regular patron of the bar, offered another quarter if he could play a game of pool with Hillhouse. The two played for about fifteen minutes. When the game ended, Hillhouse returned to his seat beside Sullivan, and King returned to his seat at the other end of the bar. Sullivan and Hillhouse moved to stools nearer the door.

Sullivan asked Hillhouse if he was ready. When Hillhouse said yes, Sullivan rose from his stool, backed up, raised the sixteen-gauge shotgun from beneath his coat, and shot King in the chest with a slug. The force of the blast knocked King off the stool and against the side wall, where he dropped to the floor. Sullivan reloaded the shotgun and ordered Hillhouse to the other end of the bar. Sullivan then placed the gun at the head of Mark Legorretta, another customer, and demanded his wallet. He took a gold watch off Legorretta's wrist. Sullivan next ordered Stephanie Lowery, the bartender, to empty the cash register. She took $150.20 from the register and gave it to Sullivan. Hillhouse joined Sullivan at the other end of the bar. The two men then backed out of the lounge and made good their escape in a stolen vehicle driven by Sullivan.

Sullivan gave Hillhouse $50.00 of the stolen money before emerging from the vehicle. Both men re-entered the Polka-Dot Lounge, drank beer, and shot pool until dawn. Around sunrise, they proceeded to the A & J Restaurant on Prytania Street, where Sullivan dropped off Hillhouse. Sullivan left to secure the vehicle and to change clothes. He returned a half-hour later on foot, having washed and changed clothes. After drinking beer for a while, Sullivan invited Hillhouse to meet this "wife" (girlfriend), Brenda Wold. The two walked to an apartment on nearby Euterpe Street. While there, the three talked for a while and smoked marijuana. Hillhouse observed the sixteen-gauge shotgun lying on a bed. He also saw a blue, pinstriped vest that accompanied the suit Sullivan had worn earlier at the time of the crime. He asked Sullivan if he might wear it, and Sullivan agreed.

Sullivan and Hillhouse left the apartment, made purchases in a pawn shop, and proceeded to the Play Girl Lounge on Magazine Street. Police were summoned to the bar pursuant to a suspicious persons report. Sullivan had walked outside to check on the stolen vehicle when police officers arrived and realized he fit the description of one of the two suspects who had committed the robbery/homicide. They arrested him outside, entered the bar, recognized Hillhouse as fitting the description of the perpetrator, and arrested him as well. At the time of his arrest, Sullivan was wearing a gold watch on his left wrist.

Both men were taken into a police station and were questioned separately. Hillhouse confessed to the crime, led the officers back to Magazine Street, and showed them Sullivan's car. They then drove around the area until Hillhouse located the apartment where he had met Wold. The apartment was unoccupied at the time, and officers were left on the scene to await Wold's return. Wold subsequently arrived and consented to a search of the apartment. An officer found the shotgun on the bed where Hillhouse had said it was located and also found both the suit jacket Sullivan had worn and the black vinyl flight bag in which the shotgun had originally been concealed.

At Sullivan's trial, Hillhouse, under a grant of total immunity from prosecution, testified he had willingly gone along with Sullivan's plan to make some quick money. He stated Sullivan had told him of the plan when they met in the Polka-Dot Lounge. Hillhouse asserted he had been shocked when Sullivan, for no apparent reason, shot King.

Lowery positively identified Hillhouse and Sullivan in court as the persons who had committed the armed robbery at the C-Note Lounge. She stated she did not see who had shot King, but after she heard the shot she ducked down behind the bar before looking up to see what had happened. She testified she saw Sullivan holding a shotgun to a customer's head. She identified the jacket taken from Wold's apartment as the jacket worn by Sullivan. Lowery admitted she was unable to identify Sullivan and Hillhouse at a physical line-up conducted on April 30, 1980, but was able to identify both Hillhouse and Sullivan five days later from a photograph of the line-up. She explained her inability to identify the two men initially resumed from fear and nervousness caused by the proximity of the men and the lighting in the room.

A balistics [sic] expert testified the slug removed from the body of King had been fired by the shotgun which was found in Wold's apartment. He further testified the empty shell which had been left on the floor when Sullivan reloaded had been ejected from the same gun.

At the time of the trial, neither Legorretta, the bar patron robbed of his watch and wallet, nor Wold, was available. Thus, neither testified at trial.

Sullivan did not testify at the guilt phase of the trial. Against his counsel's advice, the defense elicited testimony from two Angola inmates and one Hunt inmate, all of whom had been incarcerated at the Orleans Parish Prison during the time Sullivan and Hillhouse had been there. The testimony concerned allegations that Hillhouse had been beaten by police and forced to confess to the crime and to implicate Sullivan. On rebuttal, the state recalled Hillhouse, who testified he had not been beaten or forced to confess and the injuries he had sustained while in custody had resulted from falls occurring during epileptic seizures.

The jury found Sullivan guilty as charged of first-degree murder, in violation of La. Rev. Stat. § 14:30(A)(1).1/ The next day, the penalty phase of the trial was conducted. Against the advice of counsel, and after a hearing in chambers,

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1/ First degree murder is "the killing of a human being: . . . [w]hen the offender has specific intent to kill or to inflict great bodily harm and is engaged in the perpetration or attempted perpetration of . . . armed robbery . . . ." La. Rev. Stat. § 14:30(A)(1).

Sullivan insisted on testifying. He told the jury the death penalty was warranted under the circumstances and requested the jury to recommend it. At the conclusion of the proceeding, the jury recommended the death penalty.

After several post-verdict motions and two prior remands by this Court for evidentiary hearings on motions for a new trial, Sullivan appeals his conviction and sentence, asserting numerous assignments of error.

II.

Sullivan first contends the state withheld exculpatory material he had sought when it failed to provide him with a copy of the initial police report containing a description of both perpetrators. This, he contends, deprived him of a fair trial. Sullivan asserts there is a significant difference between the description of the perpetrator who wielded the shotgun given by bartender Stephanie Lowery to the investigating officers and the appearance of Sullivan at the time of his arrest.

The initial police report contains seven pages and the material to which Sullivan refers is on page four where the reporting officer put a brief description of the perpetrator. In addition to writing the estimated height, weight, age, race, and gender, the officer checked off spaces next to general characteristics. One check indicated "straight" hair. Another indicated "shoulder" length. In the area for facial hair description, the officer checked "mustache." Sullivan contends he had "shortish curly hair and no mustache . . . when he was arrested only hours after the crime was committed." Sullivan maintains these check mark general description factors are exculpatory and should have been disclosed.

The state is required to provide to the defense any information in its possession which is favorable to the accused *and* is material to guilt. *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed.2d 215 (1963). This, of course, includes exculpatory and impeachment information and the "evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *United States v. Bagley*, 473 U.S. 667, 682, 105 S. Ct. 3375, 3383, 87 L. Ed.2d 481 (1985); *see also State v. Knapper*, 579 So. 2d 956, 959 (La. 1991).

The evidence in this case does not rise to the level of materiality found in *Knapper*. Assuming Lowery was the sole source of information upon which the officer had based his initial report, the evidence in the initial report has limited impeachment value. Lowery was able to identify Sullivan, both in court and from a photograph of the line-up. It is true that Lowery's identification of both Sullivan and Hillhouse was open to question because of her inability to identify them at the physical line-up and because she admitted to having chosen "in her mind" subjects

other than Sullivan and Hillhouse. Notwithstanding the damage to Lowery's testimony regarding the line-up identification, her in-court identification may have independent criteria for reliability. *See State v. Winn*, 412 So. 2d 1337 (La. 1982); *State v. Stewart*, 389 So. 2d 1321 (La. 1980).

In addition, Lowery's inaccurate description of the gunman did not directly contradict the testimony of Hillhouse. Hillhouse's credibility, albeit qualified by his deal with the state, would not have been damaged by a revelation that Lowery had given an imprecise description of the gunman. At most, Lowery's own credibility would have been further weakened, diminishing the value of her corroborative testimony.

Such a reduction in her corroborative value would not have interjected a reasonable doubt which otherwise had not existed. Unlike the situation in *Knapper, supra*, Hillhouse's testimony had other sources of corroboration. The murder weapon was found in the apartment shared by Sullivan and his girlfriend; the suit jacket worn by defendant during the robbery and killing was also found there; the gold watch allegedly taken from Legorretta was found on defendant's wrist when he was arrested later that day; and, the two men were arrested in close proximity later that day. In light of this supporting and corroborating evidence, a further weakening of Lowery's testimony would not have affected the jury's reliance on the testimony of Hillhouse. We conclude, under the *Bagley* standard, the check marks and brief description contained in the initial police report were not material to guilt and could in no way have created a reasonable doubt.

Sullivan also suggests the information was of "indirect materiality." He asserts Lowery's description of the killer gives reason to pursue his and trial counsel's original speculation, otherwise unsubstantiated, that a man named William O. Williams a/k/a George Simp a/k/a "Cookie" actually killed Joseph King.2/

This argument is without merit. Despite the assertions of trial counsel that he would have investigated further had he had the description, it is clear that at the time of the killing of King the description given by Lowery does not fit a contemporaneous photograph of Williams. In Exhibit D-3, a photograph of Williams taken 10 days after the C-Note robbery and homicide, Williams has dark, curly, collar-length hair, a thick moustache, and a goatee. The goatee and moustache are distinctive characteristics not easily missed. Additionally, Williams's hair cannot be described as straight or shoulder-length. It is not likely, then, that Williams in April 1980 could have been confused with Sullivan.

2/ Williams was, himself, killed on May 6, 1980, some three weeks after the homicide at the C-Note Lounge.

Assertions that the existence of an imprecise description of the gunman from Lowery would have resulted in the discovery of evidence implicating Williams as the real killer, based as they are on hearsay, amount to no more than unfounded speculation. Absent independent evidence directly linking Williams to the crime, Sullivan cannot show a reasonable doubt now exists with respect to his guilt.

III.

Sullivan next contends his trial counsel rendered constitutionally ineffective assistance at the guilt phase of the trial. He raised the issue first in a *pro se* motion for a new trial and subsequently by appellate counsel's motion to remand. He now maintains the discovery in the course of the *Brady* presentation of the previously unknown evidence of Williams's involvement establishes what a thorough preparation of the case might have revealed. He asserts the state's suppression of the material sought was initially responsible for the failure to present the evidence, but, to the extent this failure was not attributable to the asserted *Brady* violation, responsibility must be charged to trial counsel's failure to prepare and investigate the case. He charges counsel met with him only three times before trial for about three hours; he did not interview, either personally or through an investigator, any witnesses on the state's witness list; and he made no effort to obtain medical records that might document the injuries suffered by Hillhouse while in police custody.

At the outset, we note

> [w]hen a claim of ineffective assistance of counsel is raised on appeal, the issue is generally referred to post-conviction proceedings in which both sides can introduce evidence and the validity of the claim can be properly determined. A narrow exception to this general rule of deferring ineffective assistance claims to post-conviction proceedings has been recognized when "the record discloses evidence needed to decide the issue of ineffective assistance of counsel and that issue was raised by assignment of error on appeal, in the interest of judicial economy."

State v. Wille, 559 So. 2d 1321, 1339 (La. 1990) (quoting *State v. Ratcliff*, 416 So. 2d 528, 530 (La. 1982)). Given the extensive evidentiary hearings conducted in this case to date, we believe the record discloses all the evidence required to reach a decision and therefore we will not refer the issue to post-conviction proceedings.

To establish a claim of ineffective representation, "the defendant must [first] show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment." *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 2063, 80 L. Ed.2d 674 (1984). In other words, a defendant must demonstrate that counsel's performance was not "within the range of competence demanded of attorneys in criminal cases." *McMann v. Richardson*, 397 U.S. 759, 771, 90 S. Ct. 1441, 1449, 25 L. Ed.2d 763 (1970). Next, the defendant must show his counsel's deficient performance prejudiced his defense by depriving him of a fair trial, that is, "a trial whose result is reliable." *Strickland*, 466 U.S. at 686, 104 S. Ct. at 2064. The inquiry is whether, but for counsel's unprofessional errors, there is a reasonable probability the outcome of the trial would have been different. 466 U.S. at 695, 104 S. Ct. at 2068.

As revealed in the evidentiary hearings, Sullivan's trial counsel, Joseph Meyer, had taken over the case from his prior counsel, Robert Zibilich, who had personality problems with Sullivan. Zibilich had represented Sullivan for nearly two years, had made extensive pre-trial preparations, and had completed everything procedurally. Meyer's preparation for the trial, therefore, would not have been as extensive as would have been required otherwise.

Meyer testified that the principal witnesses for the state were Hillhouse and Lowery. Hence, he concentrated his efforts on destroying their credibility. He did obtain a photograph of Williams and had spoken with an A & J Restaurant waitress who would have testified she had seen defendant, Hillhouse, and Williams together at the restaurant. Meyer chose not to put the waitress on the stand because her testimony corroborated that of Hillhouse by placing the two men together on the morning of the murder.

Sullivan also alleged his girlfriend, Brenda Wold, should have testified and her testimony would have been to the effect that she and Sullivan had been together at her apartment at 7:15 a.m. when Hillhouse arrived there wanting to speak with Sullivan; Hillhouse had asked her if he could leave his flight bag there while he was offshore; Sullivan had said he would meet Hillhouse at the A & J Restaurant; and she had written letters to this effect in April 1980. In fact, Wold was unavailable to testify because she was in Puerto Rico at the time. In 1984, at one of the hearings on defendant's motion for a new trial, Wold stated she had, at Sullivan's direction, falsified the letters. She testified she had known these to be lies and would never have testified to them at trial. Her version of the events the morning of the killing are directly corrobative of Hillhouse's testimony and would have been extremely beneficial to the state.

Meyer was able, through cross-examination and argument, to cast doubt on various aspects of the state's case. He stressed the "sweetheart" deal Hillhouse had received from the state and how a snitch would have said anything in return for avoiding a certain second degree murder conviction. He suggested Hillhouse may have been the killer. As suggested Hillhouse may have been the killer. As suggested by Sullivan, he also presented the testimony of the three prisoners who testified Hillhouse was beaten in order to obtain a confession. Meyer also effectively cast suspicion on the source of the gold watch allegedly taken during the robbery and found on defendant's wrist at the time of his arrest. Nevertheless, while Meyer was able to impeach Lowery's identification testimony, he was never able to discredit the testimony of Hillhouse.

We acknowledge this case was plagued by the unwillingness and unavailability of various key witnesses, namely Legorretta and Wold. It is abundantly clear, however, that had these two witnesses testified the state's case would have been stronger rather than weaker. Sullivan was actually in a *more desirable* position fighting a weaker case than he should have been attempting to fight a stronger one. We conclude Sullivan has both failed to establish even one error on the part of his trial counsel under the *Strickland* standard and suffered no prejudice at the guilt phase of the trial as a result of anything his counsel either did or failed to do.

IV.

Sullivan next asserts the jury was given an instruction on specific intent which required it to presume such intent on the facts of this case. The instruction thus, according to Sullivan, unconstitutionally shifted the burden of proof to the defendant, in violation of *Sandstrom v. Montana*, 442 U.S. 510, 99 S. Ct. 2450, 61 L. Ed.2d 39 (1979). Sullivan focuses on the portion of the charge in which the trial judge provided an example for the jury. The judge stated:

> An [intent] to kill or inflict great bodily harm may be inferred from the facts and circumstances of a homicide. A specific intent to kill would also be implied in any deliberate cruel act consciously committed by one person against another; if, for instance, a man armed with a deadly weapon should suddenly, with little or no apparent cause o[r] provocation, kill another, the law would presume that such a killing was deliberate and intentional and done for the purpose of killing or inflicting great bodily harm.

Trial transcript, vol. 3, p. 573. Sullivan contends the charge becomes less and less permissive as it progresses, concluding in a mandate to the jury that it, too, must

presume intent in this case. He also asserts the remainder of the charge does nothing to counteract the shifting of the burden of proof and the error is not harmless on this evidentiary record.

A jury instruction which creates a presumption of specific intent violates the requirement of the due process clause of the 14th Amendment that the state prove each element of a crime beyond a reasonable doubt. *Sandstrom, supra,* at 513, 99 S. Ct. at 2453, 2459; *see also State v. Hamilton,* 478 So. 2d 123, 128 (La. 1985), *cert. denied,* 478 U.S. 1022, 106 S. Ct. 3339, 92 L. Ed.2d 743 (1986). *Sandstrom* violations, however, are subject to the harmless error standard enunciated in *Chapman v. California,* 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed.2d 705 (1967), i.e., whether it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained. *Yates v. Evatt,* 500 U.S. ___, 111 S. Ct. 1884, 1892, 114 L. Ed.2d 432 (1991). It is crucial "to ascertain from the trial court's instructions that the jurors, as reasonable persons, would have considered the entire trial record, before looking to that record to assess the significance of the erroneous presumption." 111 S. Ct. at 1894.

Taken alone, the presumptive example in the jury charge may so narrow the jurors' focus as to leave it questionable that they looked to evidence other than that establishing the predicate before inferring specific intent. The trial judge, however, clearly instructed the jury to consider the "facts and circumstances of [the] homicide," before inferring the intent to kill or inflict great bodily harm. In addition, the judge stated specific intent would be implied when a person "*consciously* commit[s]" "any *deliberate* cruel act" before reciting his presumptive example. The tone of the instruction is that only after the jury has considered all relevant facts and circumstances presented to them, and then found the facts establishing the presumption, may the jury infer specific intent existed to kill or inflict great bodily harm. Under the court's charge on specific intent, read in its entirety, those circumstances considered by the jury included the finding that defendant had acted "consciously" and "deliberate[ly]." In this light, a reviewing court could readily find a reasonable juror would have looked to other evidence bearing on the fact subject to the presumptive example, i.e., intent to kill or inflict great bodily harm.

Unlike the evidence in *Yates,* and more similar to the evidence in *Hamilton,* the evidence in this case clearly indicates Sullivan, from a short distance away, deliberately pointed the shotgun at the victim's chest and fired. This evidence overwhelmingly supports finding beyond a reasonable doubt Sullivan had the specific intent to kill or inflict great bodily harm. There is no evidence to suggest the shooting was accidental or unintentional.

Because the evidence enables us to determine beyond a reasonable doubt the verdict resting upon it would have been the same in the absence of the

presumption given by the trial judge, we conclude the instruction on specific intent, even if erroneous, did not contribute to the jury's verdict. *Chapman, supra; State v. Gibson,* 391 So. 2d 421 (La. 1980).

V.

Sullivan next argues the jury instruction on reasonable doubt undermined the level of assurance in the outcome of both the guilt phase and the penalty phase of the trial required by the due process clause, in violation of *Cage v. Louisiana,* 498 U.S. ___, 111 S. Ct. 328, 112 L. Ed.2d 339 (1990). The state concedes the charge was essentially the same as the charge found to be improper in *Cage.*3/ The question for our resolution, therefore, is whether it appears beyond a reasonable doubt that the erroneous instruction did not contribute to the jury's finding of guilt. *See State v. Cage,* 583 So. 2d 1125 (La.), *cert. denied,* 502 U.S. ___, 112 S. Ct. 211, 116 L. Ed.2d 170 (1991). Compared to *Cage,* Sullivan asserts, the evidence of guilt in this case is not overwhelming.

3/ The instruction at issue provided

> If you entertain any reasonable doubt as to any fact or element necessary to constitute the defendant's guilt, it is your sworn duty to give him the benefit of that doubt and return a verdict of acquittal. Even where the evidence demonstrates a probability of guilt, yet if it does not establish it beyond a reasonable doubt, you must acquit the accused. This doubt must be a reasonable one; that is, one founded upon a real, tangible, substantial basis, and not upon mere caprice, fancy or conjecture. It must be such a doubt as would give rise to a *grave uncertainty,* raised in your minds by reason of the unsatisfactory character of the evidence; one that would make you feel that you had not an abiding conviction to a *moral certainty* of the defendant's guilt. If, after giving a fair and impartial consideration to all of the facts in the case, you find the evidence unsatisfactory upon any single point indispensably necessary to constitute the defendant's guilt, this would give rise to such a reasonable doubt as would justify you in rendering a verdict of not guilty. A reasonable doubt is not a mere possible doubt. It should be an actual or *substantial doubt.* It is such a doubt as a reasonable person would seriously entertain. It is a *serious doubt,* for which you could give good reason.

Trial transcript at 566-68 (emphasis added).

We find Sullivan's assertions without merit. Despite Sullivan's best attempts to characterize the state's case as a "chain of weak links," the testimony of Hillhouse fingering Sullivan as the leader and triggerman remains unrefuted, even in light of the deal given him in exchange for his testimony. Whatever the weight given Lowery's identification of Sullivan in the photograph of the line-up and in her identification of Sullivan at trial, other evidence, albeit circumstantial, corroborates Hillhouse's version of the facts. The murder weapon, the flight bag, and the suit jacket worn by Sullivan during the crime were later found at the apartment shared by Sullivan and Wold. It was to this apartment that Sullivan had brought Hillhouse to meet his "wife" the morning of the murder.

The evidentiary record clearly supports a finding that the erroneous instruction was harmless beyond a reasonable doubt. *See Chapman, supra; Gibson, supra.* In light of this evidence, the impact of the erroneous instruction could not have affected the jury's deliberation as to Sullivan's guilt. Given our disposition of the death sentence recommended by the jury, *see infra* at section XII, it is unnecessary to resolve the challenge of the erroneous instruction as it applied to the penalty phase of the trial.1/

VI.

Sullivan next argues the state's opening statement at the penalty phase and the jury instructions in the penalty phase erroneously suggested to the jury that a death penalty is automatic upon a finding of an aggravating circumstance and did not clearly indicate such a finding merely authorized a jury to consider the appropriateness of the death penalty. He asserts the prosecutor misstated the applicable law and the judge's instructions did not alleviate the problem by providing a clear and unambiguous statement of the law and the jury's responsibilities. Sullivan then concludes this requires vacating the death sentence. Because of our disposition of the death sentence, *see infra* at section XII, we find it unnecessary to address this issue.

VII.

Sullivan contends that in the course of voir dire the trial court first discouraged certain questioning and then refused to allow defense counsel to examine fully the prospective jurors relative to their unwillingness to return a death penalty. He argues the trial judge refused to allow his counsel sufficient latitude necessary to explore fully the attitudes and opinions of those prospective jurors who initially declared to the prosecutor an inability to return a death penalty

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1/ We are confident that a jury instruction such as this one will not be used in future criminal proceedings.

for religious reasons. He contends he was denied his right to a full voir dire and the state benefitted from more challenges than it was entitled as well as from a pro-death jury.

A defendant's right to an impartial jury prohibits the exclusion of venire members "simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction." *Witherspoon v. Illinois*, 391 U.S. 510, 522, 88 S. Ct. 1770, 1777, 20 L. Ed.2d 776 (1968). Currently, the standard for determining whether a prospective juror may be excluded for cause because of his views on the death penalty is "whether the juror's views [on capital punishment] would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" *Wainwright v. Witt*, 469 U.S. 412, 424, 105 S. Ct. 844, 852, 83 L. Ed.2d 841 (1985); *see also* La. Code Crim. Proc. art. 798. The exclusion of potential jurors must be limited to those who are "irrevocably committed . . . to vote against the death penalty regardless of the facts and circumstances that might emerge in the course of the proceedings" and to those whose views prevent them from making an impartial decision on the question of guilt. *Witherspoon*, 391 U.S. at 523 n.21, 88 S. Ct. at 1777 n.21; *State v. Copeland*, 530 So. 2d 526, 532-33 (La. 1988).

When a juror is challenged for cause because of his answers concerning the death penalty, defense counsel must be given the opportunity to traverse the juror for rehabilitation. *State v. David*, 425 So. 2d 1241, 1249 (La. 1983). A full review of the voir dire reveals that at no time was defense counsel ever prevented from attempting to rehabilitate any of the fifteen jurors who had expressed unwillingness to impose the death penalty. The only questions for the trial court were whether the juror would automatically vote against the death penalty regardless of the facts or circumstances presented at trial and whether the juror's attitude toward the death penalty would have prevented him from making an impartial decision as to the defendant's guilt. *State v. Celestine*, 443 So. 2d 1091 (La.), *cert. denied*, 469 U.S. 873, 105 S. Ct. 224, 83 L. Ed.2d 154 (1983). Under that standard, the trial court properly excluded the prospective jurors.

Sullivan also asserts the trial court erred in excluding jurors who could have been fair and impartial on the issue of guilt despite their predisposition against the death penalty. This contention is meritless. Exclusion of prospective jurors who are properly excluded under *Witherspoon* from the jury that decides guilt or innocence in a bifurcated trial does not violate a defendant's 6th Amendment rights. *Lockhart v. McCree*, 476 U.S. 162, 106 S. Ct. 1758, 90 L. Ed.2d 137 (1986). We have previously rejected the notion that so-called death qualified jurors are conviction-prone. *State v. Ward*, 483 So. 2d 578 (La.), *cert. denied*, 479 U.S. 871, 107 S. Ct. 244, 93 L. Ed.2d 168 (1986); *State v. Jones*, 474 So. 2d 919 (La. 1985), *cert. denied*, 476 U.S. 1178, 106 S. Ct. 2906, 90 L. Ed.2d 992 (1986).

VIII.

Sullivan maintains the prosecutor, in his rebuttal, improperly commented on Sullivan's failure to testify, thus violating his right against self-incrimination. A trial court "shall" declare a mistrial when the prosecutor "refers directly or indirectly to . . . [t]he failure of the defendant to testify in his own defense . . . ." La. Code Crim. Proc. art. 770(3). *See Griffin v. California*, 380 U.S. 609, 85 S. Ct. 1229, 14 L. Ed.2d 106 (1965) (references to a defendant's invocation of 5th Amendment right to silence are unconstitutional). Not all purported indirect references, however, require that a mistrial be ordered. *State v. Johnson*, 541 So. 2d 818, 822 (La. 1989).

In the remark at issue, the prosecutor argued

> is it coincidental that [Hillhouse] was arrested with John Sullivan several feet away in the same place? Is it coincidental that Detective Gifford and Detective Myers were called to the Play Girl Lounge, not for one person but for two people and they found Michael Hillhouse and John Sullivan? Is it coincidental that Mrs. [Lowery] talked about two people and not one, two people and at no time and even in Mr. Meyer's argument, and I ask you to consider this, at no time in his argument does he at anytime say that John Sullivan is not in that bar?

Trial transcript, vol. 3, pp. 563-64.

It is clear the remark in this case is not an impermissible reference to Sullivan's failure to take the stand. Taken in the context of the rest of the prosecutor's argument, the statement is a comment on the fact that the state's case was uncontroverted by any evidence presented to the jury. Because the statement does not focus the jurors' attention upon defendant's failure to testify in his own behalf, the argument is without merit.

IX.

Sullivan asserts the state's argument appealed to passion and prejudice at both phases of the trial. In the guilt phase, he complains about the following statement made during rebuttal:

> Mr. Meyer said, "Say no to Michael Hillhouse, say no to Michael Hillhouse, we are not going to buy that story." I submit to you, ladies and gentlemen that you shouldn't

> say no to Joe King, you shouldn't say no to Joe King. He was a person and he had rights just like you and me. He may not have accomplished much in his life and maybe li[k]e Mrs. L[o]wery said, he was a fixture at this bar, but he certainly had a right to live. Don't say yes to John Sullivan, good-by, don't say yes to John Sullivan.

Trial transcript, vol. 3, pp. 549-50

Sullivan argues the worth of the victim is not relevant to whether Hillhouse was worthy of belief. Rather, he argues, the prosecutor's comment implies he knew Sullivan was guilty and had to make the deal to get the more culpable party.

Prior to the quoted statement, the prosecutor had conceded that without Hillhouse's testimony the state had absolutely nothing. He then explained why the state had made a deal with Hillhouse even though his confession to the police evidenced guilt of second degree murder. He noted

> I had to make a decision to whether or not the guy went into the C-Note Lounge with this thing and snuffed out the life of Joe King, whether or not I will allow him to go back out there, walk the streets. That's a decision I had to make.

Trial transcript, vol. 3, p. 549.

In this context, the statement to which Sullivan now objects, neither improperly refers to evidence outside the record developed at trial nor vouches for the credibility of the witness. *See State v. Smith*, 554 So. 2d 676 (La. 1989). In addition, the statement does not inject an extraneous issue into the trial. The bargain made with Hillhouse in exchange for his testimony was a prime focus of defense counsel's closing argument. While the statement may have approximated a victim impact statement made during the guilt phase of the trial, it was clearly not outside the scope of rebuttal argument.

Sullivan also objects to a statement made by the prosecutor during the penalty phase of the trial. Given our disposition of the penalty phase of the trial, *see infra* at section XII, we find it unnecessary to reach the issue.

X.

Sullivan contends, in a footnote in his brief, that "the cumulative effect of [the] violations of [his] rights was a denial of due process and fundamental

fairness." He asserts the record is replete with examples of the trial court interrupting and curtailing examination by defense counsel, engaging in examination of witnesses in a manner which would be objectionable if done by counsel, and interposing objections where the prosecution failed to do so. While he concedes "many of these practices may not be error in each instance," Sullivan maintains "the cumulative effect may well have been prejudicial."

We disagree. A thorough review of the record reveals no pattern of abuse by the trial court. In fact, the court, in some instances, interrupted in an effort to assist the *defense*. That the trial, from voir dire to the return of the verdict, lasted only one day is not significant. The jury was sent to deliberate at 9:30 p.m. and returned a verdict at 10:26 p.m. The facts of the case were neither complex nor extensive. Thus, a prolonged period of deliberation could not have been expected. Sullivan provides no testimony from jurors that they were too tired to function or any evidence they had sought a recess. In short, there is nothing in the record which would support a finding that the guilt phase of Sullivan's trial was fundamentally unfair or violated his right to due process of law.

XI.

Because this a capital case, we will address Sullivan's other, unbriefed, assignments of error, raised by his previous counsel as well as one raised by Sullivan *pro se*.

A.

Sullivan contends the trial court erred in allowing a police officer to testify Wold had executed a consent to search form when neither the original of the form nor Wold herself was available.

If Sullivan is alleging no consent to search was given and, therefore, the search was unlawful, such an argument, as well as evidence establishing lack of consent should have been presented by Sullivan at the hearing on the motion to suppress. *State v. Scott*, 307 So. 2d 291 (La.1975). The validity of the consent to search form was not an issue at trial. *See* La. Code Crim. Proc. art. 703(F). In any event, Wold testified in 1984 she had consented to the search.

Sullivan appears to be making a best evidence or hearsay argument, as counsel did object at trial to any mention of the consent to search form on grounds it was a photocopy and the person who had executed the document was not available to be cross-examined. This argument is meritless. The prosecutor stated the original consent form was unavailable, and Wold was, at the time of trial, in Puerto Rico. Because the photocopy is the substantial equivalent of an original, its admission did not violate the best evidence rule (at that time La. Rev. Stat. § 14:436)

in the absence of a showing the copy did not accurately reflect the original. *State v. Stuart*, 344 So. 2d 1006 (La. 1977). Defense counsel, having an opportunity to cross-examine the officer who provided the consent form, made no showing that the copy did not accurately reflect the original.

B.

Sullivan asserts the trial court erred in refusing to admit into evidence a prior statement of Hill house. The record reflects that on recross Hillhouse admitted making the statement and that it was inconsistent with his trial testimony. When a witness admits making a prior inconsistent statement, the prior statement is not independently admissible. La. Rev. Stat. § 15:493; *State v. Williams*, 455 So. 2d 1171 (La. 1984). The trial court did not err in so concluding.

C.

Sullivan's original appellate counsel briefed the issue raising the contention there was insufficient evidence to sustain a conviction for first degree murder. Rather, he maintains, the evidence at most supported a conviction for second degree murder. He argues the state failed to prove he had possessed the specific intent to kill or inflict great bodily harm upon the victim. He indicates Hillhouse testified there had been no discussion of violence. He also asserts Lowery had her back turned at the time of the shooting and could not have seen exactly what transpired, despite attesting that the victim had neither reached for a weapon nor provoked the attack.

The state was required to prove, beyond a reasonable doubt, Sullivan killed King and had the specific intent to kill him or to inflict great bodily harm while engaged in the perpetration or attempted perpetration of an armed robbery. La. Rev. Stat. § 14:30(A)(1). An armed robbery is the taking of anything of value belonging to another from the person of another or that is in the immediate control of another by use of force or intimidation and while armed with a dangerous weapon. La. Rev. Stat. § 14:64.

The evidence clearly supports a finding the killing was committed during the course of an armed robbery. Hillhouse testified Sullivan entered the bar while armed with a sawed-off shotgun with the intent to commit an armed robbery. After asking Hillhouse if he were ready, Sullivan got off the stool, took a couple of steps back, pulled the shotgun up, and shot King. Sullivan then reloaded the gun, told everyone it was a holdup, and demanded all the money. Both Lowery and Hillhouse testified Sullivan, while holding the shotgun to the head of Legorretta, robbed him of his wallet and watch. Sullivan further demanded Lowery hand over the cash from the register. On these facts, there is no doubt the "armed robbery was an immediate concomitant of the murder and formed, in conjunction with it, one

continuous transaction." *State v. Williams*, 383 So. 2d 369, 372 (La. 1980), *cert. denied*, 449 U.S. 1103, 101 S. Ct. 899, 66 L. Ed.2d 828 (1981).

These facts also support a finding Sullivan had possessed the intent to kill or to inflict great bodily harm upon the victim. The deliberate pointing and firing of a shotgun at a victim at point-blank range is sufficient to establish beyond a reasonable doubt the element of specific intent to kill or to inflict great bodily harm. *State v. Neslo*, 433 So. 2d 73 (La. 1983).

Viewing all the evidence in the light most favorable to the prosecution, a rational fact-finder could have found, beyond a reasonable doubt, Sullivan had killed King with the specific intent to kill or inflict great bodily harm while engaged in the perpetration of an armed robbery. *See Jackson v. Virginia*, 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed.2d 560 (1979). Hence, this argument is without merit.

D.

Sullivan asserts the evidence is insufficient to sustain a jury finding that the killing was especially cruel, atrocious, or heinous and the death penalty cannot be based on a system of double-counting, where the armed robbery both elevates the crime to first degree murder and also sustains the imposition of the death penalty. Given our disposition of the penalty phase of the trial, *see infra* at section XII, it is unnecessary to address these contentions.

E.

Sullivan maintains the trial court erred in denying his first motion for a new trial filed on June 10, 1982, and the *pro se* supplement filed on June 17, 1980. We have already discussed all issues implicated by this motion. Further discussion is, therefore, unnecessary.

F.

In an unbriefed assignment of error, filed *pro se*, Sullivan alleges the transcripts have been tampered with, altered, and padded with testimony that never existed. A review of the record in the case reveals no evidence of tampering. This argument is meritless.

XII.

Finally, Sullivan contends his trial counsel rendered constitutionally ineffective assistance at the penalty phase of the trial. We previously remanded for an evidentiary hearing on this issue. *State v. Sullivan*, 559 So. 2d 1356 (La. 1990). On remand, the court ruled orally that while defense counsel's failure to prepare for

the penalty phase of the trial was wrong, and that "anytime . . . a defendant is charged with first degree murder, defense counsel has to prepare on the basis that a guilty verdict may be returned[,]" nonetheless, based upon the circumstances of the crime, "the result would not have changed if all the other evidence had been admitted." Hence, the court concluded Sullivan suffered no prejudice as a result of his trial counsel's failure to prepare.

Sullivan asserts his trial counsel's failure to provide effective assistance was total and complete because nothing whatsoever was done to investigate, to evaluate, or to prepare a mitigation defense.[5/] He contends the failure to prepare and present a mitigation defense amounted to a breach of counsel's duty to conduct a reasonable investigation, including an investigation of his background for possible mitigating evidence.

In evaluating a claim of ineffective assistance of counsel during the penalty phase of a capital case, we must first determine whether a reasonable investigation would have uncovered mitigating evidence. *State ex rel. Busby v. Butler*, 538 So. 2d 164, 169 (La. 1988). If such evidence could have been found, we must consider whether counsel had a tactical reason for failing to put the evidence before the jury. *Id.* Where mitigating evidence is not presented to the jury because of counsel's tactical choice, a defendant must overcome the strong presumption that, under the circumstances, the challenged action might be considered sound trial strategy. *Id.* If it is determined counsel's actions were not taken for tactical reasons or if the tactical reasons were unreasonable, we must then assess whether the defendant suffered actual prejudice from counsel's ineffectiveness. *Id.* As we have previously noted, "[t]he benchmark . . . for judging any such claim must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Busby, supra*, at 167 (citing *Strickland, supra*, 466 U.S. at 686, 104 S. Ct. at 2063).

We note at the outset Sullivan's trial counsel, in the evidentiary hearing, candidly admitted he failed to prepare for the penalty phase of the trial because he "arrogan[tly]" thought the jury would return only a second degree

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5/ Such a defense is imperative, under the circumstances, because the Louisiana death sentencing provision requires the jury to consider evidence of mitigating circumstances before imposing the death penalty. La. Code Crim. Proc. art. 905.3. One of the mitigating circumstances the jury may consider is that "[a]t the time of the offense the capacity of the offender to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect or intoxication." La. Code Crim. Proc. art. 905.5(e).

murder conviction, thereby precluding a penalty phase.6/ Given the facts of this case, we believe his assumption to have been unreasonable. We agree with the court which conducted the evidentiary hearing that any time a defendant is charged with first degree murder, defense counsel must prepare for the eventuality that a guilty verdict may be returned. *See Blake v. Kemp*, 758 F.2d 523, 533 (11th Cir.), *cert. denied*, 474 U.S. 998, 106 S. Ct. 374, 88 L. Ed.2d 367 (1985) (attorney who fails to make preparation for penalty phase deprives client of reasonably effective assistance of counsel).

A.

We conclude in this case a reasonable investigation would have uncovered mitigating evidence. Counsel would have been able to put before the jury the fact Sullivan was raised in an abusive, alcoholic, often brutal environment. Sullivan's mother and sisters, had they been contacted, would have testified at length and corroborated the details of Sullivan's turbulent childhood. They also would have told the jury they loved him and pleaded with the jury to spare his life.

Further inquiry by Sullivan's counsel would have proved the existence of mental illness and explained its significance. The records of Sullivan's 1968 hospitalization for schizophrenia were readily accessible at the time of the trial. Those records would have provided the basis for current evaluations and expert testimony to confirm the continued existence of the disease and to interpret to a jury how it continues to affect him today. While the jury heard from Sullivan that the had once been diagnosed as schizophrenic, there was no elaboration by experts as to the significance of the diagnosis, nor was there an explanation made to the jury that while Sullivan may appreciate the difference between right and wrong at an intellectual level, his disease prevents him from integrating the knowledge to the other, emotional side of his personality. Experts who testified at the evidentiary hearing indicated that in stressful situations Sullivan disassociates into a fantasy world and cannot differentiate fantasy from reality. Certainly this is the type of evidence contemplated by La. Code Crim. Proc. art. 905.5(e), and it is evidence readily available had any reasonable investigation been undertaken.

B.

We next conclude there can be no tactical reason for defense counsel's failure to put this evidence before the jury. "Strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Busby, supra,*

6/ Statements in this context by former counsel are subject to careful scrutiny given they are conducive to accomplishing the original defense goals of trial and sentencing.

at 171 (citing *Burger v. Kemp*, 483 U.S. 776, 794, 107 S. Ct. 3114, 3126, 97 L. Ed.2d 638 (1987)).

Counsel's frank admission in the evidentiary hearing that he conducted no investigation whatsoever because of his abiding faith in his ability to obtain nothing more severe than a second degree murder conviction negates any assumption trial strategy motivated the decision to keep this evidence from the jury. Rather, it was counsel's complete failure to perform his duty to investigate that resulted in the jury's not having the benefit of the mitigating evidence, evidence which was both relevant and admissible. *See Lockett v. Ohio*, 438 U.S. 586, 605-06, 98 S. Ct. 2954, 2965, 57 L. Ed.2d 973 (1978). Under these circumstances, then, we conclude the level of representation Sullivan received at the penalty phase of the trial amounted to constitutionally ineffective assistance of counsel.

C.

Having concluded the assistance provided Sullivan at the penalty phase was constitutionally ineffective, we must still determine whether, but for counsel's errors, there is a reasonable probability the result of the proceeding would have been different, i.e., whether Sullivan suffered actual prejudice as a result. *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068. We respectfully disagree with the trial court's conclusion the result would not have been different had the jury heard the evidence in mitigation.

In *Busby, supra*, we found if the mitigating circumstance of mental impairment had been established, the degree of likelihood a jury would not have recommended a death sentence is sufficient to undermine confidence in the outcome of the penalty phase of the trial. *Id.* at 172. Such evidence has the potential to change totally the evidentiary picture by altering the causal relationship which can exist between mental illness and homicidal behavior. *Busby, supra*, at 173. "Psychiatric mitigating evidence not only can act in mitigation, it also can significantly weaken the aggravating factors." *Id.* (citing *Middleton v. Dugger*, 849 F.2d 491 (11th Cir. 1988)) (in turn citing *Huckaby v. State*, 343 So. 2d 29, 33-34 (Fla.), *cert. denied*, 434 U.S. 920, 98 S. Ct. 393, 54 L. Ed.2d 276 (1977)).

We believe the testimony sought to be presented to the jury in the present case, *viz.*, that Sullivan was diagnosed as a paranoid schizophrenic, a disease which continues to affect his judgment and his actions, that he was severely abused as a child, and that his mother and sisters love him and would plead with the jury to spare his life, could, with reasonable probability, have altered the outcome at the penalty phase of the trial. This case is simply not distinguishable from *Busby*, where the murder involved premeditation, luring the victim into the woods, shooting him in the back, stripping the body of a watch and a wallet, and covering the body in an attempt to hide it. We determined there the jury was deprived of information by

which it could make the life or death decision in a rational and individualized manner. The jury in this case was deprived of similarly important information through the inaction of defense counsel. Since Sullivan suffered prejudice as a result of his counsel's ineffective assistance, he is entitled to a new sentencing hearing wherein the evidence in mitigation he seeks to introduce, and presumably rebuttal testimony by the state, is heard by the jury.

XIII.

For the foregoing reasons, we affirm the defendant's conviction of first degree murder. We vacate the sentence of death and remand to the trial court for a new sentencing hearing.

CONVICTION AFFIRMED, SENTENCE VACATED. REMANDED FOR NEW SENTENCING HEARING.

CALOGERO, C.J., concurs in the result.

DENNIS, J., dissents with reasons.

MARCUS, J., dissents in part and concurs in part and assigns reasons.

MARCUS, Justice (dissenting in part and concurring in part).

Under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed.2d 674 (1984), the test for ineffective assistance at the penalty phase is whether there is a "reasonable probability" that absent the errors, the sentencer would have concluded that the balance of aggravating and mitigating circumstances did not warrant death. In the present case, the jury was made aware that defendant had been previously diagnosed as a schizophrenic. Given the circumstances of this case, I do not believe that additional evidence on this issue would have had a reasonable probability of changing the jury's recommendation. Accordingly, I respectfully dissent from the majority's opinion insofar as it vacates defendant's death sentence and remands for a new sentencing hearing, but concur with the majority opinion insofar as it affirms defendant's conviction of first degree murder.

DENNIS, Justice, dissenting.

I respectfully dissent from the portion of the opinion affirming the conviction.

This case presents again the question of whether the harmless error standard of *Chapman v. California*, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed.2d 705 (1967) applies to a jury instruction that violates the Fourteenth Amendment and the principle of *In re Winship*, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed.2d 368 (1970), because it fails to clearly and effectively inform each reasonable juror that the state must prove every element of the criminal offense with which the defendant is charged beyond a reasonable doubt.

The United States Supreme Court has not resolved this question in a square holding, but it has given clear signals that such an error cannot be harmless. See discussion in *State v. Cage*, 583 So. 2d 1125, 1130-36 (La. 1991) (Dennis, J., dissenting) and authorities cited therein.

Moreover, the majority failed to properly apply the harmless error standard in the present case. The majority does not seriously attempt to apply the actual holding of Chapman but instead lapses into what is actually nothing more than a *Jackson v. Virginia* sufficiency of evidence review. *Id.* at 1136-37.

Finally, the majority has again defaulted completely in its duty to address the question of whether a reasonable doubt instructional error can be harmless under our state constitution and laws. *Id.* at 1137-38.

In fact, the decision of the United States Supreme Court in *Cage v. Louisiana*, 498 U.S. ----, 111 S. Ct. 328, 112 L. Ed.2d 339 (1990), and this court's derelictions of duty in implementing it have now produced a sad state of affairs. Although this court at one time consistently reversed convictions based on the type of incorrect reasonable doubt instruction given to the jury in this case, see *State v. Vessell*, 450 So. 2d 938 (La. 1984); *State v. McDaniel*, 410 So. 2d 754 (La. 1982); *State v. Mack*, 403 So. 2d 8 (La. 1981); *State v. Moffett*, 127 La. 760, 53 So. 982 (1911); *State v. Ardoin*, 49 La. Ann. 1145, 22 So. 620 (1897), and although the United States Supreme Court has since declared such an instruction unconstitutional, *Cage v. Louisiana*, 498 U.S. ----, 111 S. Ct. 328, 112 L. Ed.2d 339 (1990), it is now becoming clear that this court will always declare such an error to be harmless, so that, as a matter of fact, *all* trial judges in Louisiana are now free to give the same incorrect instruction on proof beyond a reasonable doubt that only a *few* of them mistakenly or obstinately have given in the past. The criminal justice system in Louisiana would have been more just had the U.S. Supreme Court never decided *Cage v. Louisiana*.

For these reasons, I would reverse the conviction and remand the proceedings for a new trial in accordance with the above.

DOCKET MASTER

ORLEANS PARISH CRIMINAL DISTRICT COURT

STATE OF LOUISIANA
vs.
JOHN L. SULLIVAN

VIOLATION(S):
R.S. 14:30

CASE NO. 276-394
SECTION: "G"
CLASS: 1st

APPEAL

#1 DOCKET MASTER

DATE	PROCEEDINGS
5/8/80	Filed Indictment Capias Issued A True Bill No Bail Magistrate Court paperwork filed (M-97662)
5/9/80	Allotted. Arraignments set 5/12/80.
5/12/80	Sullivan thru his counsel Michael Barry, Esq., for Arraignment only, waived the reading of the Indictment and entered a plea of Not Guilty. The Court ordered the plea recorded. Counsel for the defense filed Oral Motions to Suppress Identification, Confession and Evidence. The Court set the hearings for 6/3/80. The Court appointed Robert Zibilich to represent Sullivan. Send Notices.
6/3/80	Sullivan appeared at the for hearings. State filed a Motion for Discovery of Defense Alibi Witnesses. Court granted the defense until 6/13/80 for answers. Based on the statements by the State, Defense counsel withdrew the Motions to Suppress Confession and Evidence. Hearing on Motion to Suppress Identification: Filed as Evidense S-1. Court denied the Motion to Suppress Identification to which counsel for the Defense noted an objection, Defense counssel informed the Court the Defense will file other pleadings. Court set the hearings for 6/16/80. No notices to be sent.
6/16/80	Defense counsel in another Court. The Court continued the above matter to be reassigned.
6/25/80	Set for Hearings on Discovery and Bill of Particulars 7/11/80. Send no Notices. As per ADA.
7/18/80	On Motion by the State, the Court continued and reset the Hearings for 7/25/80.
7/25/80	Sullivan appeared at the bar of the Court attended by his counsel for Hearings. State filed all answers. Court ruled the Defense's answer to the State's Motion for Alibi Witnesses good and sufficient in law. Defense counsel satisfied with all of the State's answers to Bill of Paritculars and Discovery and Inspection. Court set the trial for 10/2/80.
9/8/80	Court ordered Sullivan's Motion to Dismiss received from the Clerk's Office filed.
10/2/80	Sullivan appeared at the bar of the Court attended by his counsel Robert Zibilich, Esq., of OIDP. On motion by the Defense because a necessary witness unavailable the Court continued and reset the trial for 11/12/80. The Court denied Sullivan's Motion to Dismiss to which Defense counsel noted an objection. Sullivan requested a copy of the Indictment and Minute entries. Defense counsel state he would furnish same.
11/12/80	On Motion by the Defense, the Court continued and reset the Trial for 12/11/80.
12/11/80	On motion by the Defense because of the illness of Defense counsel the Court continued and reset the trial for 2/12/81.
2/12/31	Defendant Sullivan appeared attended by counsel Robert Zibilich,Esq. Court ordered the Motion for Substitution of Counsel recieved this day filed into the record. Court denied the Motion. Court ordered the trial continued to be reassigned.

BEST AVAILABLE COPY

DOCKET MASTER

ORLEANS PARISH CRIM. DISTRICT COURT

CASE NO. 276-394

DATE	PROCEEDINGS
2/3/81	Court set the Trial for 4/2/81.
3/31/81	Writ DENIED. See Decree in file.
4/6/81	The Court ordered the Motion to Quash received in the mail from the Clerk's Office filed. Trial reset for 5/13/81.
5/13/81	The defendant, John L. Sullivan, attended by his counsel, Robert Zibilich. Defense counsel requested a hearing on a Motion to Quash filed by the defendant. The Court for a witness relative to the Motion to Quash continued the trial without date and set the hearing on Motion to Quash for 6/15/81.
6/15/81	Court continued and reset the hearing for 6/16/81.
6/16/81	Court continued and reset the hearing for 6/17/81.
6/17/81	Court continued and reset the hearing for 6/19/81.
6/19/81	Court continued this matter until 7/26/81. Issue subpoenas.
6/26/81	Defendant Sullivan appeared attended by counsel Robert Zibilich, Esq. State marked for identification S-1. Both sides submitted the matter. Court denied the Motion to Quash and to Suppress Evidence. Defense counsel filed an oral motion for a Preliminary Hearing. Court denied the motion and set the trial for 9/17/81.
7/9/81	Court ordered the Motion for Exception received in the mail filed.
7/9/81	As per ADA Trial reset for 9/24/81.
7/28/81	Court reset the trial for 9/17/81.
9/17/81	The Court ordered the Decree from the Supreme Court of Louisiana filed, pending further action by this Court. Trial of this matter is hereby stayed. See Decree in file.
9/22/81	The Court ordered the Decree from the Supreme Court of Louisiana filed. Writ Denied. See Decree in file.
10/13/81	Court ordered the Decree from the Supreme Court of Louisiana filed. Writ denied. See Decree in file.
1/14/82	As per ADA trial date is set for 3/31/82.
3/5/82	Court ordered the Decree from the Supreme Court filed. Writ denied. Decree in file.
3/31/82	Defendant Sullivan appeared attended by his Counsel Robert Zibilich, Esq. Court ordered the trial to be reassigned. Court denied the Motion to Recuse. Defense counsel filed an oral motion to be relieved as Attorney of Record. Granted, and the Court appointed Joe Meyer to represent Defendant Sullivan. Trial set for 5/13/82.
5/13/82	Continued and reset the trial for 5/20/82.
5/20/82	The defendant John L. Sullivan present attended by his Counsel Joe Meyer. ADA moved the Court for a Continuance of Trial. Defense Counsel moved for a Release. The Court DENIED the motion for Release to which Defense Counsel noted an objection. Defense Counsel filed a Motion for a Speedy Trial. GRANTED and set the trial for 5/26/82. Defense Counsel filed a Petition and Order for Writ of Habeas Corpus Ad Testificandum as to Daniel Hyorth, Maurice Diggs and Jerry Thomas. GRANTED returnable 5/26/82.
5/26/82	The defendant John L. Sullivan present attended by his Counsel Joseph Meyer. The State and Defense stipulated in the event Defense witnesses not produced by the Department of Corrections the Defense would be entitled to a Mis-trial. Both sides being ready the Court ordered the trial to begin.

SEE #2 DOCKET MASTER

DOCKET MASTER

ORLEANS PARISH CRIMINAL DISTRICT COURT

STATE OF LOUISIANA
vs.
JOHN L. SULLIVAN

VIOLATION(S):
R.S. 14:30

CASE NO. 276-394
SECTION: "G"
CLASS: 1st

APPEAL

DOCKET MASTER

DATE	PROCEEDINGS
5/26/82	State marked for identification S-1 thru S-4. Jury returned with verdict: "GUILTY AS CHARGED". Defense Counsel moved for a recess on the sentencing hearing. The Court granted the motion and recessed the sentencing hearing until 5/27/82.
5/27/82	The defendant John L. Sullivan present attended by his Counsel Joseph Meyer for sentencing. State rests its case. Defense rests its case. Jury returned with the following sentence: "Jury recommends that the defendant be sentenced to death". Set for motions on 6/3/82.
6/3/82	Continued and reset for 6/10/82.
6/10/82	Joseph Meyer filed a Motion for a New Trial. Hearing set for 6/17/82.
6/17/82	The defendant John L. Sullivan attended by his Counsel Joseph Meyer. The defendant filed a Supplemental Motion for a New Trial. There being no answer filed by the State on the original Motion for a New Trial the Court continued and reset the hearing for 6/28/82.
6/28/82	The defendant John L. Sullivan attended by his Counsel Joseph Meyer. Joseph Meyer filed a Motion to Withdraw as Counsel. The Court GRANTED the Motion and appointed Dwight Doskey of the O.I.D.P. to represent the defendant. The State filed answer to Motion for New Trial. The defendant filed Motions for Copy of all Pre-trial Minutes and Trial Transcript and For Production of Documents. The Court set the hearing on a Motion for New Trial for 7/12/82.
7/12/82	Defendant Sullivan appeared attended by his counsel Dwight Doskey, Esq. State filed answers. On motion by the Defense for transcript Court continued and reset all hearings for 9/7/82.
8/27/82	Defense counsel, Joseph Meyer, Esq., filed Motion and Oder of Compensation for Legal Services.
9/7/82	On Motion of the Defense Counsel Dwight Doskey of the OIDP, the Court continued and reset the Hearing on Motion for A New Trial until 10/15/82.
10/15/82	Hearing on Motion for New Trial set for 12/20/82. (no entry needed)
12/20/82	Defense attorney not present the Court continued and reset the hearing on a Motion for New Trial for 12/27/82.
12/27/82	On motion by Defense counsel Dwight Doskey,Esq. Court continued and reset the hearings on a Motion for New Trial for 1/27/83.
1/27/83	The Court ordered the Decree from the Supreme Court of Louisiana filed Writ granted. On motion by Defense counsel Dwight Doskey,Esq. for transcript the Court continued the hearing on a Motion for a New Trial without date and set this matter for status hearing on 2/3/83.

(O V E R)

DOCKET MASTER

ORLEANS PARISH CRIMINAL DISTRICT COURT

CASE NO. 276-394

DATE	PROCEEDINGS
4/3/83	Defendant Sullivan appeared attended by counsel Dwight Doskey, Esq. of OIDP. Court denied the Motion for Production of Entire Transcript. Court this day rendered judgment as to the above. See Judgment in file.
3/30/83	Court ordered the Decree from the Supreme Court of Louisiana filed. Writ denied. Moot.
7/1/83	The court ordered the Decree from the Supreme Court of Louisiana filed. Writ granted for limited purposes of transferring to Trial Court for Consideration. See Decree in File.
3/19/84	The Court ordered the Report from Dr. Kenneth Ritter filed into the record.
4/6/84	As per Court Hearing on Ruling on Motion for New Trial, Substitution of Counsel and Sentencing set for 4/11/84. Notify Dwight Doskey, Esq. of OIDP.
4/11/84	Defendant Sullivan appeared attended by his COunsel . On Motion by the Defense in order to locate a witness the Court continued and reset all Hearing for 4/17/84.
4/17/84	Defendant Sullivan appeared attended by his COunsel. On motion by the Defense the Court continued and reset the Hearing on Motion for a New Trial for 5/14/84.
5/15/84	The Defendant Sullivan appeared in Court attended by his Counsel Dwight Doskey, Esq., of O.I.D.P. Defense counsel filed a Motion to Compel the Attendance of an Out-of-State Witness. The Court signed the Order and set the return date for 5/28/84 the date set for the Hearing on a Motion for a New Trial.
	OUT OF SEQUENCE MINUTE ENTRY
8/16/83	Defendant Sullivan appeared represented by Defense Counsel Dwight Doskey, Esq. of OIDP filed a Written Motion for Appeal. Court granted the Motion and ordered the appeal returnable to the Fourth Circuit Court of Appeal on 8/12/83. The Appeal taken is in Forma Pauperis. Court reporter John Zamora.
5/23/84	Clerk of Court filed Certification of Notice of Appeal to the Fourth Circuit Court of Appeal.
5/29/84	The Defendant Sullivan appeared in Court attended by his counsel Dwight Doskey, Esq., of O.I.D.P., for a Hearing on a Motion for a New Trial. During the testimony of Brenda Wold the Court marked for identification a Letter Motion for New Trial-1. The State had no questions for the witness. The Defense questioned the witness. The Court for the testimony of Defense witnesses and counsel Joseph Meyer recessed the Hearing until 6/11/84. The Court ordered a release issued for Brenda Wold.
6/11/84	On motion by the Defense for further information the Court continued and reset the Hearing for 6/18/84.
6/18/84	On joint motion by theState and Defense the Court continued and reset the Hearing for 7/2/84.
7/2/84	On Motion by the Defense for list of names, Court reset the hearing for 7/17/84.
7/17/84	Motion for New Trial reset for 8/10/84 (no entry given).
8/1/0/84	Counsel for the Defendant Dwight Dosky filed a Motion for a coumtinuance and the Court signed same and set the matter for Motion for New Trial on 10/2/84. Place Defendant on jail list.
10/2/84	On Motion by the Defense, Defense Counsel at Court of Appeal. Court continued and reset the hearing for 10/23/84.

SEE #3 DOCKET MASTER

DOCKET M. IER

ORLEANS PARISH CRIMINAL DISTRICT COURT

STATE OF LOUISIANA
vs.
JOHN L. SULLIVAN

VIOLATION(S):
R.S. 14:30

CASE NO. 276-394
SECTION: "C"
CLASS: 1st

APPEAL

#3 DOCKET MASTER

DATE	PROCEEDINGS
10/23/84	Defense counsel not present, Court continued and reset the hearing for 10/30/84.
10/30/84	On joint motion by the State and Defense the Court continued the Hearing without date and set this case for a Status Hearing on 10/31/84.
10/31/84	On joint motion by the State and Defense for witnesses the Court continued and reset the Hearing for 11/27/84.
11/27/84	On Motion by the Defense for further investigation, Court continued and reset the hearing on Motion for New Trial for 12/17/84.
12/17/84	On Motion by the Defense for further information Court continued and reset the hearing for 12/19/84. Issue Instanter Subpoena for Thomas Williams.
12/19/84	Defendant appeared attended by Counsel Dwight Doskey Esq. for Hearing on Motion for a New Trial. Thomas Williams and Joseph Meyer, Esq. were duly sworn. Defense marked for Identification a Photograph of George Simp D-M-1 and a computer Readout D-M-2 and filed both into the record without objection by the State. Defense Counsel informed the Court he will file a Subpoena Duces Tecum. Court set return date for 1/4/85 and recessed Hearing until the return date.
1/4/85	Defendant appeared attended by his Counsel and informed the Court that the Defense satisfied with the return on the Subpoena Duces Tecum. Court set Status Hearing on 1/9/85.
1/9/85	Defendant appeared attended by his Counsel. On Motion by Defense Counsel. Court continued and reset Hearing for 1/29/85.
1/29/85	On Motion by the Defense the above matter is continued without date.
3/15/85	As per Court Hearing on Motion for New Trial set for 3/19/85. Place Defendant on jail list.
3/19/85	Defendant Sullivan appeared attended by his counsel Dwight Doskey of OIDP. Court denied the Motion for a New Trial to which Defense counsel noted an objection. Under Art. 876-877 Court set sentence for 3/22/85.
3/22/85	Defendant appeared attended by his Counsel for Sentencing. Court sentenced the Defendant as follows: John L. Sullivan be remanded to Parish Prison of Parish of Orleans, there to remain in Custody of Criminal Sheriff and there to remain awaiting your removal to Louisiana State Penitentiary at Angola until the day and hour fixed in accordance with the law of State of Louisiana for your execution, at which time and place to be designated in accordance with law. You, John L. Sullivan, shall then and there be put to death in manner prescribed by law, that is, by causing to pass thru your body a current of electricity of sufficient intensity to cause death and by the application and continuance of such current thru your body until you are dead, dead, dead. Defendant was said to be 39 years of age born on 7/30/45 in the State of Florida. Court set return date for 5/7/85. John L. Sullivan represented by Dwight Doskey, O.I.D.P. filed Written Motion for Appeal. Court granted the Motion and ordered the Appeal returnable to Fourth Circuit Court of Appeal on 5/7/85. Court Reporter Joe Riddle.
3/27/85	Clerk's office filed Notification of Notice of Appeal to the Fourth Circuit Court of Appeal.

BEST AVAILABLE COPY

On the 9th day of April, 1992, the following action was taken by the Supreme Court of Louisiana in the case(s) listed below:

REHEARING DENIED:

87-KA-0027 STATE OF LOUISIANA v. JOHN L. SULLIVAN (Parish of Orleans)
(Two Applications)
MARCUS, J. – would grant rehearing of State.
DENNIS, J. – would grant rehearing of defendant.

THE COURT:

The defendant is presumed to be innocent until he is proved guilty beyond a reasonable doubt.

The consequence of this rule of law is, that he is not required to prove his innocence, but may rest upon the presumption in his favor until it is overcome by positive affirmative proof. The onus, therefore, is on the State to establish to your satisfaction, and beyond a reasonable doubt, the guilt of the accused, as to the crime charged or any lesser one included in it.

If you entertain any reasonable doubt as to any fact or element necessary to constitute the defendant's guilt, it is your sworn duty to give him the benefit of that doubt and return a verdict of acquittal. Even where the evidence demonstrates a probability of guilt, yet if it does not establish it beyond a reasonable doubt, you must acquit the accused. This doubt must be a reasonable one; that is, one founded upon a real, tangible, substantial basis, and not upon mere caprice, fancy or conjecture. It must be such a doubt as would give rise to a grave uncertainty, raised in your minds by reason of the unsatisfactory character of the evidence; one that would make you feel that you had not an abiding conviction to a moral certainty of the defendant's guilt. If, after giving a fair and impartial consideration to all of the facts in the case, you find the evidence unsatisfactory upon any singel [sic] point indispensably necessary to constitute the defendant's guilt, this would give rise to such a reasonable doubt as would justify you in rendering a verdict of not guilty.

A reasonable doubt is not a mere possible doubt. It should be an actual or substantial doubt. It is such a doubt as a reasonable person would seriously entertain. It is a serious doubt, for which you could give good reason.

The indictment in this case is a mere accusation or charge against the defendant, and it is not evidence of his guilt, and does not carry any presumption of guilt, and you must not be influenced by it in considering the case.

You are entitled to acquit because you disbelieve witnesses, because you are not convinced beyond a reasonable doubt or because of the lack of evidence as to an essential element of the crime, and you are not restricted to the evidence adduced from the witness stand for the creation of such reasonable doubt.

You are the exclusive judges of the facts. You are to find from the evidence which facts have been proved and which facts have not been proved. For this purpose you determine the credibility of the witnesses, accordingly as you are impressed with their veracity.

You may take into account their demeanor, their manner on the stand, the probability or improbability of their statements, the interest or want of interest they may have in the case, and every circumstance surrounding the giving of their testimony which may aid you in weighing their statements.

If you believe that any witness in the case, either for the State of [sic] for the defense, has wilfully [sic] and deliberately testified falsely to any material fact, I charge you that you are justified in disregarding the entire testimony of such witness as proving nothing, and as unworthy of belief. You have the right to accept

as true, or reject as false, the testimony of any witness, accordingly as you are impressed with their veracity.

If you find that any witness, either for the State of [sic] for the defense has been previously convicted of a crime or crimes, you may consider such prior conviction or convictions in determining their credibility or the weight you are to give to their testimony as a witness.

The defendant is permitted by law to testify in his own behalf. If he does not exercise this privilege you should not consider this fact or permit it to raise a presumption of guilt against him, and you should consider in determining his guilt or innocence, only those facts testified to and brought out during the trial.

The law requires the district attorney to make an opening statement explaining the nature of the charge and the evidence by which he expects to prove the same, while leaving counsel for the defense the option of making such a statement or waiving his right to do so. An opening statement is not evidence and does not prove anything in the case. You should consider only the evidence and testimony of the sworn witnesses who have appeared before you.

An accomplice is defined as one who is associated with another in the commission of a crime. An accomplice is a competent witness, either for the State or the defense, whether he has been convicted or not or whether he has pleaded guilty or a nolle prosequie [sic] or dismissal has been entered as to him, or whether he is joined in the same indictment with the person or persons on trial or not, provided he is not on trial at the same time. Corroboration is desirable, but not

always indispensable. The jury may convict on his uncorroborated testimony, and while it is not the rule of law, it is rather the rule of our experience in dealing with that class of testimony that while you may convict on the uncorroborated testimony of an accomplice, still you should act on his testimony with great caution. Subject it to a careful examination in light of the other evidence in the case, and you are not to convict on such testimony alone unless satisfied after a careful examination of it's [sic] truth and that you can safely rely on it. What the law means about corroboration of the testimony of an accomplice is not merely corroboration of his narrative and mere details of how the crime was committed but some real and independent corroboration tending to implicate the accused in the commission of the offense charged. It is not sufficient to corroborate an accomplice as to the facts, generally. He should be corroborated as to some material fact which tends to prove that the accused was connected with the crime charged. A corroboration that merely raises a suspicion of guilt, because the accused had an opportunity is not sufficient.

This defendant is charged with the crime of first degree murder. First degree murder is the killing of a human being when the offender has a specific intent to kill or to inflict great bodily harm, and is engaged in the perpetration or attempted perpetration of armed robbery. Armed robbery is the theft of anything of value from the person of another or which is in the immediate control of another, by use of force or intimidation while armed with a dangerous weapon, and whether the weapon used is dangerous within the meaning of the law is a question for the jury to decide, while considering not only the character of the weapon but by whom,

upon whom, and in what manner it was used. It has been held that a piece of brick, an iron, a rod, a pipe, a gun, a knife or any such object might each be a dangerous weapon depending upon the manner used, and whether as used, it might be calculated or likely to produce death or great bodily harm.

The law with reference to the specific intent to kill or inflict great bodily harm is as follows:

First of all, the time element. The law knows no specific time within which an intent to kill or inflict great bodily harm must be formed so as to make a homicide murder. If the will of the person accompanies the act a moment antecedent to the act which causes the death, it will be as completely sufficient to make the offense murder as if it were a day or any other time.

It is sufficient if there was a design or determination to kill or inflict great bodily harm formed in the mind of the slayer at any moment before or at the time of the fatal blow.

If an assault is made upon a person, not with the intent of killing him but with the intent of inflicting great bodily harm, and death is caused by such assault, it is murder.

In such cases it is necessary that assault be of such a nature as would likely cause death or great bodily harm, and the death that resulted must have been the natural and probable consequence of the intentional act or acts.

An intnet [sic] to kill or inflict great bodily harm may be inferred from the facts and circumstances of a homicide.

A specific intent to kill would also be implied in any deliberate cruel act consciously committed by one person against another; if, for instance, a man armed with a deadly weapon should suddenly, with little or no apparent cause of [sic] provocation, kill another, the law would presume that such a killing was deliberate and intentional and done for the prupose [sic] of killing or inflicting great bodily harm.

Now, one of the lesser but possible verdicts in this case is that of second degree murder.

Second degree murder is the killing of a human being when the offender has a specific [sic] to kill or inflict great bodily harm, or where the offender is engaged in the perpetration or attempted perpetration of armed robbery, even though he has no intent to kill or inflict great bodily harm. So, the difference between the two is, is that in first degree it must be during an attempt or perpetration of an armed robbery where he has an intent to kill or inflict great bodily harm, or in second degree, if he is engaged in the attempted perpetration or perpetration of an armed robbery and he has no intent to kill, but death results, then that would be second degree murder. So, the difference between the two in that respect is the intent to kill or inflict great bodily harm. If it is present, it is first degree murder, if it is not present, it is second degree murder.

Now, another lesser but possible verdict in this case is manslaughter, which is a homicide which would be murder if the offender had a specific intent to kill or inflict great bodily harm, but the offense is committed in sudden passion or heat of

blood immediately caused by provocation sufficient to deprive an average person of his self-control and cool reflection. Provocation shall not reduce a homicide to manslaughter if the jury finds that the offender's blood had actually cooled, or that an average person's blood would have cooled, at the time the offense was committed.

Now, both the State and the defendant are entitled to the individual verdict of each one of you as jurors in this case.

Before I get to that, let me just say with regard to identification, in determining whether or not the defendant has been properly identified as the person who committed the offense charged against him, you should consider all the testimony in the case, both for the State and the defense, considering the means of identification, the circumstances under which he was identified, the opportunity for identifying the defendant, the description of he [sic] apparel or physical being as stated by the witness, and the probabilities or improbabilities that it was the defendant. Evidence in connection with an identification should be considered in connection with all the other evidence in the case, and if on all of the evidence there is a reasonable doubt, you should acquit. If there is not you should convict.

Now, as I have stated, both the State and the defendant are entitled to the individual verdict of each one of you as jurors. Under the law and your oath you must adhere to your verdict unless persuaded by one or more of your fellow jurors based upon some law, evidence or testimony you have heard during this trial. Only then may you change your verdict.

There are four possible verdicts in this case. Guilty as charged, which is guilty of frist [sic] degree murder, guilty of second degree murder, guilty of manslaughter, and not guilty.

The law requires that all twelve of you agree to reach any one of these four verdicts. When twelve of you so agree, you have reached a legal verdict. At that time, the foreman, whom you will select when you retire, using the four typewritten forms of the verdict on the top as a guide, will write in this area, word for word, whichever verdict you have reached, and place the signature on the line bearing the word, Foreman". [sic]

Go with the sheriff, please, and we will await your verdict.

MR. MEYER:

Your honor, before the jury leaves, I would like to ask for a special charge. May I approach the bench?

THE COURT:

You better come up here because I don't know if I am going to give what you are talking about. That should have been given to me before I started.

(Attorneys for the State and Defense approach the bench, out of the hearing of the jury.)

(Proceedings held in the presence of the jury.)

THE COURT:

In order to keep this as uncomplicated as possible, inadvertently, the District Attorney made a statement that if the man with whom they made a bargain ran out

on him they would have no recourse. Without complicating it to the point where you won't understand what's happening, that is not correct. He would have had recourse if that would have been the case in this particular case, if those facts had been present, the District Attorney could have charged the man, if the man had, so called, run out on him. I merely want to correct that statement as an inadvertent statement by counsel in absence of knowing the absolute particular law on this point. That's all I want to make clear in your mind.

Go ahead and deliberate.

RESPONSE REQUESTED

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

(3)

NO. 92-5129

OCTOBER TERM, 1992

JOHN L. SULLIVAN
PETITIONER

Versus

STATE OF LOUISIANA
RESPONDENT

On Petition For A Writ Of Certiorari
To The Supreme Court
Of The
State of Louisiana

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

HARRY F. CONNICK
DISTRICT ATTORNEY
OF ORLEANS PARISH

JACK PEEBLES, BAR NO. 8340
ASSISTANT DISTRICT ATTORNEY
OF ORLEANS PARISH

ATTORNEY OF RECORD

619 South White Street
New Orleans, Louisiana 70119
Telephone: (504) 822-2414

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BRIEF IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI

Respondent, the State of Louisiana, opposes the granting of the writ of certiorari to review the judgment and opinion of the Supreme Court of the State of Louisiana which, on petitioner's direct appeal, affirmed petitioner's conviction of first degree murder.

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition Below

Petitioner John L. Sullivan was convicted of first degree murder and sentenced to death after a trial in which the jury's instruction on reasonable doubt during the guilt phase of the trial was constitutionally deficient under the standard of Cage v. Louisiana, 111 S.Ct. 328 (1990) (per curiam). On direct appeal the Supreme Court of Louisiana affirmed the conviction on March 2, 1992, holding that the instruction on reasonable doubt, though admittedly erroneous, was harmless error. State v. Sullivan, 596 So.2d 177 (La. 1992). The Court also found that petitioner's trial counsel was ineffective in the penalty stage of the trial, and therefore vacated the sentence and remanded for a new sentencing hearing. Applications for rehearing by petitioner and respondent were denied by the Louisiana Supreme Court on April 9, 1992.

B. Statement of the Facts:

A complete statement of the facts of the offense in this case is included in the opinion rendered by the Louisiana Supreme Court. State v. Sullivan, 596 So.2d 177 (La. 1992). Briefly, petitioner was convicted of shooting to death a patron of a New Orleans bar during a robbery attempt. Petitioner was identified at trial by the co-perpetrator of the robbery, Michael Hillhouse, as the trigger-man. A bar maid "positively identified Hillhouse and Sullivan in court as the persons who had committed the armed robbery at the C-Note Lounge. She stated she did not see who had

shot King [the victim], but after she heard the shot, she ducked down behind the bar before looking up to see what had happened. She testified she saw Sullivan holding a shotgun to a customer's head." State v. Sullivan, supra, at 180.

Petitioner, after shooting the patron with a shotgun, brought the co-perpetrator to his girlfriend's apartment, where he left the shotgun, clothing, and a watch taken from a customer. The two perpetrators were arrested while on a drinking spree a few hours later when police identified them from descriptions given by surviving patrons of the bar. At trial the barmaid identified a jacket taken from the girlfriend's apartment as the jacket worn by petitioner at the time of the murder. State v. Sullivan, supra, at 180.

A ballistics expert at trial identified a shotgun found at the girlfriend's apartment as the one which fired the shot that killed the victim. The Louisiana Supreme Court noted that "the testimony of Hillhouse [the co-perpetrator] fingering Sullivan as the leader and triggerman remains unrefuted, ...", and that in addition to the testimony of the barmaid, "other evidence, albeit circumstantial, corroborates Hillhouse's version of the facts. The murder weapon, the flight bag, and the suit jacket worn by Sullivan during the crime were later found at the apartment shared by Sullivan and Wold [Sullivan's girlfriend]. It was to this apartment that Sullivan had brought Hillhouse to meet his 'wife' the morning of the murder." State v. Sullivan, supra, at 186.

The Louisiana Supreme Court concluded that "In light of this evidence, the impact of the erroneous instruction could not have affected the jury's deliberation as to Sullivan's guilt." State v. Sullivan, supra, at 186. Because the Court found trial counsel to be ineffective during the penalty phase of the trial it did not analyze the jury charge during the penalty phase but remanded the case to the trial court for a new penalty hearing.

REASONS FOR NOT GRANTING THE WRIT

Petitioner Sullivan has petitioned this Court to decide whether a reasonable doubt jury instruction, which is constitutionally deficient under Cage v. Louisiana, 111 S.Ct. 328 (1990), is subject to a harmless error analysis. Respondent submits that this case does not present a substantial federal question, for two reasons. First, the standard for review of ambiguous jury instructions used in Cage was subsequently disapproved by this Court. Estelle v. McGuire, 112 S.Ct. 475 (1991), 482 n. 4. Thus, there should be no cases in the future in which the harmless-error rule will be applied to cases in which jury instructions have been found deficient under the Cage standard. Second, the previous decisions of this Court indicate that a constitutional error in jury instructions on reasonable doubt may be subjected to a harmless-error analysis under Chapman v. California, 87 S.Ct. 824 (1967). Harmless error review may be applied to "...errors that may have affected either the instructions the jury heard or the record it considered..." Rose v. Clark, 106 S.Ct 3101 (1986), at 3108 n. 11.

I.

THE STANDARD FOR REVIEW OF AMBIGUOUS JURY INSTRUCTIONS USED IN CAGE V. LOUISIANA HAS BEEN DISAPPROVED BY THIS COURT.

This Court in Cage v. Louisiana held that a reasonable juror could have interpreted the instruction to allow a finding of guilt based on a degree of proof below that required by the Due Process Clause. Cage, 111 S.Ct., at 330. In Estelle v. McGuire, 112 S.Ct. 475 (1991), the Court established the "reasonable likelihood" standard as appropriate for review of ambiguous jury instructions:

> "[I]n reviewing an ambiguous instruction such as the one at issue here, we inquire 'whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way' that violates the Constitution."
> Id. at 482

This Court acknowledged that language in Cage might be read as endorsing a different standard of review for jury instructions, and held that "we now disapprove the standard of review language in Cage and Yates [v. Evatt, 111 S.Ct. 1884], and reaffirm the standard set out in Boyde [v. California], 110 S.Ct. 1190 (1990)." Estelle v. McGuire, 112 S.Ct. 475 (1991), at 482 n. 4.

As a consequence of this specific disapproval of the standard of review used in Cage, it is unlikely that reasonable doubt instructions will be judged using that standard. There will be no occasion to consider the harmless-error doctrine in the context of the standard of Cage v. Louisiana. No state court has ruled on the reasonable doubt jury charge in petitioner's case using the "reasonable likelihood" standard of Boyde and McGuire. The state submits that both Cage and petitioner's case should be reevaluated in light of the new standard of McGuire, since use of

the offending terms "grave uncertainty," "actual substantial doubt," and "moral certainty" may not establish a reasonable likelihood that the jury has applied the challenged instruction in a way that violates the Constitution. This Court should decline to consider the issue in this case because the issue has not been considered by the highest court of the State of Louisiana.

II.

A CONSTITUTIONAL ERROR IN JURY INSTRUCTIONS ON REASONABLE DOUBT MAY BE SUBJECTED TO A HARMLESS-ERROR ANALYSIS UNDER CHAPMAN V, CALIFORNIA, 386 U.S. 18, 87 S.CT. 824, 17 L.ED.2D 705 (1967).

The well-settled standard of harmless error, as set forth in Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), focuses on "whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." Further, "the court must be able to declare a belief that [the error] was harmless beyond a reasonable doubt." Chapman, 386 U.S. at 23, 87 S.Ct. at 828. While the standard refers to "evidence," it has been applied to jury instructions as well.

In Rose v. Clark, 478 U.S. 570, 106 S.Ct. 3101, 92 L.Ed.2d 460 (1986), this Court reversed a lower court finding that the harmless error rule could never apply to erroneous jury instructions involving Sandstrom (Sandstrom v. Montana, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d.39 (1979)) presumptions. The Court noted that "while there are some errors to which Chapman does not apply, they are the exception rather than the rule." 478 U.S. at 578, 106 S.Ct. at 3106. The Court then reviewed the context of the

erroneous instruction and found "the error at issue here--an instruction that impermissibly shifted the burden of proof on malice--is not 'so basic to a fair trial' that it can never be harmless." 478 U.S. at 580, 106 S.Ct. at 3107. Therefore, the Court held "Chapman's harmless-error standard applies in cases such as this one." Later cases of the Court have followed Rose. See Carella v. California, 491 U.S. 263, 109 S.Ct. 2419, 105 L.Ed.2d 218 (1989); Pope v. Illinois, 481 U.S. 497, 107 S.Ct. 1918, 95 L.Ed.2d 439 (1987).

Petitioner argues that unconstitutional jury instructions on reasonable doubt may not be subject to harmless error, and cites Rose v. Clark in support of its position. However, the Court in Rose analyzed the question using the query: What is to be done about a trial error that, in theory, may have altered the basis on which the jury decided the case, but in practice clearly had no effect on the outcome? The majority of this Court adopted such an analysis in Rose v. Clark, supra, 106 S.Ct. 3101, at 3108 (footnote 11), and concluded:

> "This [above stated] question applies not merely to Sandstrom violations, but to other errors that may have affected either the instructions the jury heard or the record it considered--including errors such as mistaken admission of evidence, or unconstitutional comment on a defendant's silence, or erroneous limitation of a defendant's cross-examination of a prosecution witness. All of these errors alter the terms under which the jury considered the defendant's guilt or innocence, and all theoretically impair the defendant's interest in having a jury decide his case. The dissent's argument--that the Sixth Amendment forbids a reviewing court to decide the impact of a trial error on the outcome....logically implies that all such errors are immune from harmless-error analysis. Yet this Court repeatedly has held to the contrary."
>
> (citations omitted) (emphasis supplied)

This Court has adhered to the harmless-error doctrine as necessary to uphold the "principle that the general purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence, and promotes public respect for the criminal process by focusing on the underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error." Delaware v. Van Arsdale, 475 U.S. 673, 681, 106 S.Ct. 1431, 1436, 89 L.Ed.2d 674 (1986).

This Court has applied harmless error analysis to a variety of trial errors and has found that most constitutional errors can be harmless. Fulminante v. Arizona, ___U.S.___, 111 S.Ct. 1246, 1263-1264, ___L.Ed.2d___ (1991). Moreover, this Court has viewed errors in jury instructions as trial error and has subjected them to harmless error analysis. See, e.g., Clemons v. Mississippi, 494 ___U.S.___, 110 S.Ct. 1441, 1450-1451, 108 L.Ed.2d 725 (1990) (unconstitutionally overboard jury instructions at the sentencing stage of a capital case); Carella v. California, 491 U.S. 263, 109 S.Ct. 2419, 2421, 105 L.Ed.2d 218 (1989) (jury instruction containing an erroneous conclusive presumption); Pope v. Illinois, 481 U.S. 497, 501-504, 107 S.Ct. 1918, 1921-1923, 95 L.Ed.2d 439 (1987) (jury instruction mistaking an element of the offense) Rose v. Clark, 478 U.S. 570, 106 S.Ct. 3101, 92 L.Ed.2d 460 (1986) (jury instruction containing an erroneous rebuttable presumption); Kentucky v. Warton, 441 U.S. 786, 99 S.Ct. 2088, 60 L.Ed.2d 640 (1979) (failure to instruct the jury on the presumption of innocence). Thus, there was a substantial basis in this Court's prior decisions for the conclusion of the Louisiana Supreme Court

that an error in reasonable doubt jury instructions is trial error subject to harmless error analysis.

In contrast, a structural defect involves an error that renders the entire trial fundamentally unfair and would not allow a harmless-error analysis. Fulminante v. Arizona, supra; Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963) (complete denial of right to counsel); Tumey v. Ohio, 273 U.S. 510, 47 S.Ct. 439, 71 L.Ed. 749 (1927) (adjudication by biased judge).

In footnote 14 of Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979), this Court concluded that cases have indicated that a failure to instruct a jury on the necessity of proof of guilt beyond a reasonable doubt can never be harmless error. Id. 443 U.S. at 320. The trial judge in the case now before this Court did not fail to give an instruction on reasonable doubt. An examination of the reasonable doubt instruction shows that the charge did include those elements generally given in such a charge. The problem with the charge was not that no charge was given but that the jury charge included the questioned phrases and concepts of "grave uncertainty," "actual substantial doubt," and "moral certainty," condemned in Cage v. Louisiana, supra. Again, the state emphasizes that up to this point no state court has ruled on whether the inclusion of these phrases would have created a "reasonable likelihood" that a jury would have used an unconstitutional standard in deciding petitioner's guilt. Estelle v. McGuire, supra.

Respondent submits that the Chapman harmless-error rule has been applied to a wide variety of constitutional errors which equally could have affected the finding of an individual juror on

the question of guilt or innocence: Delaware v. Van Arsdale, 106 S.Ct. 1431, 1438 (failure to permit cross-examination concerning witness bias); U.S. v. Hasting, 103 S.Ct. 1974, 1983 (improper comment on defendant's failure to testify); Moore v. Illinois, 98 S.Ct. 458, 466 (admission of witness identification obtained in violation of right of counsel); Milton v. Wainwright, 92 S.Ct. 2174 (admission of confession obtained in violation of right of counsel); Chambers v. Maroney, 90 S.Ct. 1975, (1981) (admission of evidence obtained in violation of Fourteenth Amendment).

Louisiana courts and courts in other states have given jury charges on reasonable doubt similar to the charge condemned in Cage v. Louisiana.

The Cage erroneous jury instruction has been used for years by district courts in Louisiana, and when objected to, its use has been affirmed on appeal. State v. Cage, 554 So.2d 39 (La. 1989); State v. Messiah, 538 So.2d 175 (La. 1988), cert. den., __U.S. __, 110 S.Ct. 880 (1990); State v. Rault, 445 So.2d 1203 (La. 1984); cert. den. 469 U.S., 873, 105 S.Ct. 225, 83 L.Ed.2d 154 (1984); State v. Taylor, 410 So.2d 224 (La. 1982); State v. Monroe, 397 So.2d 1258 (La. 1981), cert. den., 463 U.S. 1229, 103 S.Ct. 3571, 77 L.Ed 1411 (1982); State v. Stramiello, 392 So.2d 425 (La. 1981); State v. West, 552 So.2d 478 (La. App. 4h Cir. 1989), writ granted, 560 So.2d 33 (1990); State v. Washington, 522 So.2d 628 (La. 4th Cir. 1988); Bently v. State, 523 So.2d 1321 (La. 1988), cert. den. 109 S.Ct. 94, 102 L.Ed. 70 (1988); State v. Miller, 489 So.2d 268 (La. 4th Cir. 1986), writ den., 496 So.2d 1030 (La. 1986).

These charges have been given for decades, and involve unknown thousands of state prisoners. This Court, in Cage, made clear that such charges may not be given in the future, and Louisiana and other states which have previously used this charge will certainly comply with the Cage decision. It is highly likely, however, that in the vast majority of such cases the inclusion of the forbidden phrases had absolutely no effect on the outcome of the trials. Certainly it would be unfair to Louisiana, and to the other states which have used these phrases in their standard jury charges on reasonable doubt, to hold that such jury instructions are inherently prejudicial and may not even be subjected to the harmless-error analysis of Chapman v. California.

The state submits that the Chapman harmless error standard applies in the present case.

III.

THE ERROR IN CHARGING THE JURY REGARDING REASONABLE DOUBT WAS HARMLESS BEYOND A REASONABLE DOUBT.

This Court has held repeatedly that in applying the Chapman rule, the court should review the record in its entirety, quantitatively assessing the evidence before reversing the conviction for constitutional errors that may be harmless. Fulimante v. Arizona, ___U.S.___, 111 S.Ct. 1246, 1264, ___L.Ed.2d___ (1991); Rose v. Clark, 106 S.Ct. at 3106; United States v. Hastings, 461 U.S. 499, 103 S.Ct. 1974, 76 L.Ed.2d 96 (1982). Respondent submits that the facts of this case, as set out

in detail in the opinion of the Louisiana Supreme Court, demonstrate that the erroneous jury charge as to reasonable doubt given in petitioner's case was harmless beyond all reasonable doubt. See: State v. Sullivan, supra, 596 So.2d 177 (1992), at 179-181, 186.

CONCLUSION

This is not an appropriate case for resolution of issues pertaining to a "reasonable doubt" jury charge. The petition for certiorari should be denied.

Respectfully submitted,

JACK PEEBLES, BAR NO. 8340
ASSISTANT DISTRICT ATTORNEY
PARISH OF ORLEANS
619 South White Street
New Orleans Louisiana 70119
Telephone: (504) 822-2414

CERTIFICATE OF SERVICE

I certify that a copy of this Brief In Opposition To Petition For Writ Of Certiorari has been placed in the United States mail, postage prepaid, addressed to:

William J. Keppel
Michael J. Wahoske
Christopher J. Riley
Tamara J. Byram
Karen A. Fairbairn
DORSEY & WHITNEY
2200 First Bank Place East
Minneapolis, Minnesota 55402

John Wilson Reed
GLASS & REED
338 Lafayette Street
New Orleans, Louisiana 70130

Jack Peebles
Assistant District Attorney

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REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

William J. Keppel
Counsel of Record
Michael J. Wahoske
Christopher J. Riley
Tamara J. Byram
Karen A. Fairbairn
DORSEY & WHITNEY
2200 First Bank Place East
Minneapolis, Minnesota 55402
Telephone: (612) 340-2600

John Wilson Reed
GLASS & REED
338 Lafayette Street
New Orleans, Louisiana 70130
Telephone: (504) 581-7635

Attorneys for Petitioner

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IN THE
SUPREME COURT OF THE UNITED STATES

No. 92-5129

October Term, 1992

JOHN L. SULLIVAN,
Petitioner

vs.

STATE OF LOUISIANA,
Respondent

On Petition for a Writ of Certiorari
to the Supreme Court of the State of Louisiana

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

This case squarely presents the issue of whether a constitutionally deficient reasonable doubt instruction is subject to harmless error analysis. The State of Louisiana does not deny that decisions of the state courts and lower federal courts conflict on this issue. Nor does the state respond to petitioner's argument that harmless error review of the erroneous reasonable doubt instruction deprives petitioner of his Sixth Amendment right to a trial by jury. Rather than directly confronting the issue, the state attempts to focus on a footnote discussion

concerning the proper phrasing of the standard for determining erroneous jury instructions. This discussion has no bearing on the question presented here, whether an admittedly erroneous reasonable doubt instruction may be harmless.1/

There can be no doubt that the instruction on reasonable doubt in this case was erroneous. When petitioner argued below that his trial was tainted by a constitutionally erroneous reasonable doubt instruction prohibited by Cage, the state conceded the point in its brief on direct appeal. The Louisiana Supreme Court, reviewing the instruction after the issuance of McGuire, unqualifiedly held that the instruction was constitutionally improper. See Louisiana v. Sullivan, 596 So. 2d 177, 185 (La. 1992). The state did not petition or cross-petition this Court for review, nor even petition the Louisiana Supreme Court for rehearing, on the basis that an allegedly erroneous standard was used in analyzing petitioner's reasonable doubt instruction, or that there was any other argument that the instruction was not constitutionally improper. More to the point, the instruction in this case is essentially the same as that found erroneous by a unanimous Court in Cage. There is, therefore, no question whether giving the instruction was error.

1/ Louisiana reads entirely too much into footnote 4 of Estelle v. McGuire, 112 S. Ct. 475 (1991). In that footnote, this Court explains that the "different phrasings" in its recent cases evaluating jury instructions "might be read as endorsing a different standard," and merely disapproves of the specific language used to describe the standard in Cage v. Louisiana, 111 S. Ct. 328 (1990) (per curiam), and Yates v. Evatt, 111 S. Ct. 1884 (1991). McGuire, 112 S. Ct. at 482 n.4. Nothing in the footnote or in the rest of the Court's opinion in McGuire, however, questions in any way this Court's unanimous holding that the reasonable doubt instruction used in Cage--and also here--was unconstitutional.

The state's McGuire argument is merely a red herring, attempting to distract the Court from the sole question squarely presented in this case: given a constitutionally deficient reasonable doubt instruction, may the error ever be deemed harmless? In that respect, this case is similar in procedural posture to the situation this Court faced in Yates; there, the state supreme court had conceded that the instructions were unconstitutional and the respondent did not challenge that conclusion. Yates, 111 S. Ct. at 1890. Accordingly, this Court considered only whether the erroneous instructions there at issue could be subject to harmless error analysis under Chapman. The reasonable doubt instruction here, already held erroneous by this Court in Cage and by the Louisiana Supreme Court below, calls for a similarly focused inquiry.

Once the focus is centered on the pending issue, Louisiana's only argument goes to the merits of the question presented: it does not question the importance of having it answered. The state argues that an unconstitutional reasonable doubt instruction, like most errors occurring during criminal trials, is subject to harmless error analysis as set forth in Chapman v. California, 386 U.S. 18 (1967). It bases this contention on this Court's decisions that various other erroneous jury instructions are "trial" errors subject to harmless error analysis. This conclusion, however, ignores this Court's language in Jackson v. Virginia, 443 U.S. 307 (1979), and other cases that a jury instruction on the reasonable doubt standard is "an essential of the due process guarantee," the deprivation of which "can never be harmless error." Id. at 316, 320 n.14. Louisiana also fails to consider the unique nature of the reasonable

doubt instruction, which differs from most other jury instructions because it affects the framework of the trial itself by providing the jury the standard with which to evaluate the evidence. As such it is a structural element, not subject to harmless error analysis under Arizona v. Fulminante, 111 S. Ct. 1246, 1265 (1991). The instruction also provides an essential safeguard so that the trial can "reliably serve its function as a vehicle for determination of guilt or innocence," id. (quoting Rose v. Clark, 478 U.S. 570, 577-78 (1986)), and thereby "command the respect and confidence of the community." In Re Winship, 397 U.S. 358, 364 (1975). As this Court pointed out in Rose, any error affecting the fundamental fairness of a trial is not subject to harmless error analysis. Rose, 478 U.S. at 577.2/

The application of harmless error analysis to an unconstitutional reasonable doubt instruction also violates petitioner's Sixth Amendment right to a jury trial, a

---

2/ Louisiana does not address petitioner's argument that the Louisiana Supreme Court did not actually apply the Chapman test. As Justice Dennis observed in dissent, see 596 So. 2d at 193 (Dennis, J., dissenting), the court applied what amounts to a Jackson v. Virginia sufficiency of the evidence test, a test which is much more deferential to the state. See 443 U.S. at 319. If the court had applied the proper test, it could not have found the error harmless. Louisiana does not directly dispute petitioner's statement of the exculpatory facts in this case, which it had an obligation to do under Supreme Court Rule 15.1 if it perceived any misstatements. The state's case was based on the testimony of a fully immunized accomplice and an impeached eyewitness who could not make an identification after the crime and who admitted she did not see the shooting. The only physical evidence was circumstantial and did not tie the petitioner to the scene of the crime. It is especially in these types of cases, where identity and credibility issues predominate, that an erroneous reasonable doubt instruction cannot be harmless. See Monk v. Zelez, 901 F.2d 885 (10th Cir. 1990) (per curiam); Lanigan v. Maloney, 853 F.2d 40 (1st Cir. 1988); Massachusetts v. Garcia, 399 N.E.2d 460 (Mass. 1980); United States v. Pinkney, 551 F.2d 1241 (D.C. Cir. 1976). An examination of the record leaves room for reasonable doubt; the erroneous instruction was not harmless here.

point the state does not even contest in its response. The constitutional right to a trial by jury reflects a fundamental decision about the state's exercise of power. For an appellate court to assess harmless error, it would have to make post hoc determinations of credibility and fact. This would usurp the factfinding function allocated solely to the jury. As Justice Scalia points out in his concurring opinion in Carella v. California, 491 U.S. 263, 267 (1989), "the question is not whether guilt may be spelt out of a record, but whether guilt has been found by a jury according to the procedure and standards appropriate for criminal trials." Id. at 269 (Scalia, J., concurring) (quoting Bollenbach v. United States, 326 U.S. 607, 614 (1946)).

The state also does not dispute that this Court's intervention is necessary to resolve a conflict in the other state courts and lower federal courts. As explained in petitioner's brief, several states and circuits have addressed this issue and the jurisdictions are split as to whether harmless error applies. Indeed, since petitioner prepared his petition for certiorari, North Carolina has joined the ranks of those states applying harmless error analysis to an erroneous reasonable doubt instruction. North Carolina v. Montgomery, 417 S.E.2d 742, 751 (N.C. 1992). Both defendants and prosecutors have previously petitioned the Court for review on this recurring issue concerning the scope of an accused's constitutional rights, which is ripe for review and definitive answer now.

Louisiana's final argument against granting review, the "floodgates" contention, is also unavailing. As this Court is aware, petitioner cannot be required to pay the price for the state's failure to provide a fair trial that comports with the

Constitution's demands. Furthermore, since this is a case in which petitioner may still be sentenced to death, all possible doubts should be resolved in his favor. Satterwhite v. Texas, 486 U.S. 249, 258 (1988). If there are indeed, as Louisiana suggests, several states that have been utilizing unconstitutional jury instructions on reasonable doubt, this Court, in the interests of judicial economy and uniformity, should take this opportunity to resolve this important issue now, rather than allowing it to linger without definitive answer.

In any event, the state's concerns are overstated. The number of defendants who would be affected by a decision by this Court is limited by Louisiana's contemporaneous objection rule[3/] and retroactivity principles.[4/] Moreover, as Justice Dennis points out in his dissenting opinion below, the use of this instruction has not been pervasive in Louisiana since similar instructions were held unconstitutional in the past.[5/] 596 So. 2d at 193 (Dennis, J., dissenting) ("only *a few* [judges] mistakenly or obstinately" have used this instruction (emphasis in original)). In raising its "fairness" concerns, Louisiana certainly could not have intended to imply that, by repeatedly using this unconstitutional instruction, its trial courts have insulated themselves from this Court's review.

3/ Louisiana courts will not review a jury instruction error on direct appeal unless a contemporaneous objection was made at trial or unless the case is a death penalty case. La. Code Crim. Proc. Ann. art. 905.9 (West 1976).

4/ Petitioner's case is still on direct review. See Petition for Certiorari at 4 n.3, 12 n.9.

5/ See, e.g., Louisiana v. Vessell, 450 So. 2d 938 (La. 1984); Louisiana v. McDaniel, 410 So. 2d 938 (La. 1982); Louisiana v. Mack, 403 So. 2d 8 (La. 1981).

This case cleanly presents the issue of whether a constitutionally deficient reasonable doubt instruction is subject to harmless error analysis. The right to be found guilty only if the jury so finds beyond a reasonable doubt is a fundamental constitutional safeguard in the structure of a criminal trial and, as such, its deprivation should not be subjected to harmless error analysis under this Court's opinions. Petitioner urges the Court to grant the Writ of Certiorari.

Dated: October 1, 1992

Respectfully submitted,

William J. Keppel (by MPL)

William J. Keppel
Counsel of Record
Michael J. Wahoske
Christopher J. Riley
Tamara J. Byram
Karen A. Fairbairn
DORSEY & WHITNEY
220 South Sixth Street
Minneapolis, Minnesota 55402
Telephone: (612) 340-2600

John Wilson Reed
GLASS & REED
338 Lafayette Street
New Orleans, Louisiana 70130
Telephone: (504) 581-7635

Attorneys for Petitioner

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STATE OF MINNESOTA)
) SS
COUNTY OF HENNEPIN)

Mark P. Lindberg, being first duly sworn on oath, deposes and states as follows:

1. That on the 1st day of October, 1992, he did send by United States mail, pursuant to Supreme Court Rule 29.3, an envelope properly sealed and with first class postage prepaid to:

Jack Peebles, Esq.
Assistant District Attorney
619 S White ST
New Orleans LA 70119
(504) 822-2414
Attorney for Respondent State of Louisiana

one copy of Petitioner John L. Sullivan's Reply Brief in Support of Petition For A Writ Of Certiorari.

2. All parties required to be served have been served.

Mark P. Lindberg

Subscribed and sworn to before me
this 1st day of October, 1992.

Joan C Mocnik
Notary Public

My Commission Expires
August 31, 1993

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WASHINGTON, D.C. 20036
(202) 857-0700
TELEX 440455
TELECOPIER (202) 857-0869

Mark P. Lindberg
(202) 452-6950

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October 1, 1992

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Supreme Court of the United States
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Washington, D.C. 20543

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Re: State of Louisiana vs. John L. Sullivan
No. 92-5129, October Term, 1992

Dear Clerk:

Enclosed is one copy of the Petitioner's Reply Brief in Support of Petition for A Writ of *Certiorari* in the above matter.

One copy of this document have been served upon Jack Peebles, counsel for respondent. Also enclosed is a certificate of service pursuant to Supreme Court Rule 29.5(c).

Thank you very much for your assistance with this matter.

Sincerely,

Mark P. Lindberg

Mark P. Lindberg

MPL:ps
Enclosures
cc: Jack Peebles, Esq.

Jack Peebles, Esq.
Assistant District Attorney
619 S White ST
New Orleans LA 70119

John W. Reed, Esq.
Glass & Reed
338 Lafayette ST
New Orleans LA 70130

Karen A. Fairbairn, Esq.
Holiday Companies
P. O. Box 1224
4567 W 80th ST
Minneapolis MN 55440

Supreme Court, U.S.
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92-5129

NO. 5129

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1992

JOHN L. SULLIVAN,
Petitioner

vs.

STATE OF LOUISIANA,
Respondent

On Petition for a Writ of Certiorari
to the
Supreme Court of the State of Louisiana

AMICUS CURIAE IN SUPPORT OF PETITIONER

James E. Boren
343 Third Street
Suite 400
Baton Rouge, LA 70801
Telephone: (504) 387-5786

Attorney for the National
Association of Criminal
Defense Lawyers
(Amicus Curiae)

NO. 5129

IN THE
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AMICUS CURIAE IN SUPPORT OF PETITIONER

James E. Boren
343 Third Street
Suite 400
Baton Rouge, LA 70801
Telephone: (504) 387-5786

Attorney for the National
Association of Criminal
Defense Lawyers
(Amicus Curiae)

INTEREST OF THE AMICUS CURIAE

The National Association of Criminal Defense Lawyers (NACDL), is a non-profit membership organization made up of over 22,000 affiliated attorneys throughout the nation who are concerned about the criminal justice system and the citizens who come before the Courts of this country. The NACDL received written consent from both the petitioner, John L. Sullivan, and the respondent, the State of Louisiana, to file this brief in support of petitioner. (See Appendix A).

ARGUMENT

The Louisiana Supreme Court's Application of a harmless error test to a constitutionally deficient reasonable doubt instruction disregards this Court's rulings on fundamental error, violates petitioner's Sixth Amendment right to a jury trial and conflicts with decisions by lower Federal Courts and State Courts.

The NACDL's concern with the instant petition is that the Louisiana Supreme Court's use of a harmless error test with a constitutionally deficient reasonable doubt instruction effectively eviscerates John L. Sullivan's constitutional right to a trial by jury.

CONCLUSION

The NACDL respectfully expresses its support for the petitioner and his cause and requests this Honorable Court grant John L. Sullivan's Petition for a Writ of Certiorari to the Supreme Court of the State of Louisiana.

RESPECTFULLY SUBMITTED:

JAMES E. BOREN
343 Third Street
Suite 400
Baton Rouge, LA 70801
Telephone: (504) 387-5786

Attorney for the National Association of Criminal Defense Lawyers (Amicus Curiae)

APPENDIX A

CONSENT FORM

On behalf of John L. Sullivan, petitioner in the John L. Sullivan v. State of Louisiana, No. 92-5129 case, I consent to permitting the National Association of Criminal Defense Lawyers to file an amicus curiae brief in support of our petition for a writ of certiorari.

Minneapolis, Minnesota, this 24th day of August, 1992.

WILLIAM J. KEPPEL

CONSENT FORM

On behalf of the State of Louisiana, respondent in the case of John L. Sullivan v. State of Louisiana, No. 92-5129, I consent to permitting the National Association of Criminal Defense Attorneys to file an amicus curiae brief in support of John L. Sullivan's petition for a writ of certiorari.

New Orleans, Louisiana, this 21st day of August, 1992.

JACK PEEBLES
CHIEF OF APPEALS
ORLEANS DISTRICT ATTORNEY'S OFFICE

Supreme Court, U.S.
FILED
DEC 2 1992
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No. 92-5129

In The

Supreme Court of the United States

October Term, 1992

JOHN L. SULLIVAN,

Petitioner,

vs.

LOUISIANA,

Respondent.

On Writ Of Certiorari To The Supreme Court Of The State Of Louisiana

JOINT APPENDIX

WILLIAM J. KEPPEL*
MICHAEL J. WAHOSKE
CHRISTOPHER J. RILEY
TAMARA J. BYRAM
KAREN A. FAIRBAIRN
DORSEY & WHITNEY
220 South Sixth Street
Minneapolis, Minnesota
55402-1498
Telephone: (612) 340-2600

JOHN REED
GLASS & REED
338 Lafayette Street
New Orleans, Louisiana 70130
Telephone: (504) 581-7635

Counsel for Petitioner

JACK PEEBLES*
Assistant District Attorney
619 S White Street
New Orleans, Louisiana
70119
Telephone: (504) 822-2414

Counsel for Respondent

*Counsel of Record

Petition For Certiorari Filed July 8, 1992
Certiorari Granted October 19, 1992

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5/8/80	INDICTMENT FILED
5/12/80	SULLIVAN WAIVED READING OF INDICTMENT; ENTERED PLEA OF NOT GUILTY
5/26/82	TRIAL COMMENCED
5/26/82	JURY VERDICT – GUILTY AS CHARGED
5/27/82	JURY SENTENCING (DEFENDANT SENTENCED TO DEATH)
3/22/85	COURT SENTENCED SULLIVAN
3/27/85	NOTICE OF APPEAL FILED

CRIMINAL DISTRICT COURT
Orleans Parish
State of Louisiana v. John L. Sullivan

* * *

[Trial Transcript at pp. 566-78]

THE COURT:

The defendant is presumed to be innocent until he is proved guilty beyond a reasonable doubt.

The consequence of this rule of law is, that he is not required to prove his innocence, but may rest upon the presumption in his favor until it is overcome by positive affirmative proof. The onus, therefore, is on the State to establish to your satisfaction, and beyond a reasonable doubt, the guilt of the accused, as to the crime charged or any lesser one included in it.

If you entertain any reasonable doubt as to any fact or element necessary to constitute the defendant's guilt, it is your sworn duty to give him the benefit of that doubt and return a verdict of acquittal. Even where the evidence demonstrates a probability of guilt, yet if it does not establish it beyond a reasonable doubt, you must acquit the accused. This doubt must be a reasonable one; that is, one founded upon a real, tangible, substantial basis, and not upon mere caprice, fancy or conjecture. It must be such a doubt as would give rise to a grave uncertainty, raised in your minds by reason of the unsatisfactory character of the evidence; one that would make you feel that you had not an abiding conviction to a moral certainty of the defendant's guilt. If, after giving a fair and impartial consideration to all of the facts in the case, you find the evidence unsatisfactory upon any singel [sic]

point indispensably necessary to constitute the defendant's guilt, this would give rise to such a reasonable doubt as would justify you in rendering a verdict of not guilty.

A reasonable doubt is not a mere possible doubt. It should be an actual or substantial doubt. It is such a doubt as a reasonable person would seriously entertain. It is a serious doubt, for which you could give good reason.

The indictment in this case is a mere accusation or charge against the defendant, and it is not evidence of his guilt, and does not carry any presumption of guilt, and you must not be influenced by it in considering the case.

You are entitled to acquit because you disbelieve witnesses, because you are not convinced beyond a reasonable doubt or because of the lack of evidence as to an essential element of the crime, and you are not restricted to the evidence adduced from the witness stand for the creation of such reasonable doubt.

You are the exclusive judges of the facts. You are to find from the evidence which facts have been proved and which facts have not been proved. For this purpose you determine the credibility of the witnesses, accordingly as you are impressed with their veracity.

You may take into account their demeanor, their manner on the stand, the probability or improbability of their statements, the interest or want of interest they may have in the case, and every circumstance surrounding the giving of their testimony which may aid you in weighing their statements.

If you believe that any witness in the case, either for the State of [sic] for the defense, has wilfully [sic] and deliberately testified falsely to any material fact, I charge you that you are justified in disregarding the entire testimony of such witness as proving nothing, and as unworthy of belief. You have the right to accept as true, or reject as false, the testimony of any witness, accordingly as you are impressed with their veracity.

If you find that any witness, either for the State of [sic] for the defense has been previously convicted of a crime or crimes, you may consider such prior conviction or convictions in determining their credibility or the weight you are to give to their testimony as a witness.

The defendant is permitted by law to testify in his own behalf. If he does not exercise this privilege you should not consider this fact or permit it to raise a presumption of guilt against him, and you should consider in determining his guilt or innocence, only those facts testified to and brought out during the trial.

The law requires the district attorney to make an opening statement explaining the nature of the charge and the evidence by which he expects to prove the same, while leaving counsel for the defense the option of making such a statement or waiving his right to do so. An opening statement is not evidence and does not prove anything in the case. You should consider only the evidence and testimony of the sworn witnesses who have appeared before you.

An accomplice is defined as one who is associated with another in the commission of a crime. An accomplice is a competent witness, either for the State or the

defense, whether he has been convicted or not or whether he has pleaded guilty or a nolle prosequie [sic] or dismissal has been entered as to him, or whether he is joined in the same indictment with the person or persons on trial or not, provided he is not on trial at the same time. Corroboration is desirable, but not always indispensable. The jury may convict on his uncorroborated testimony, and while it is not the rule of law, it is rather the rule of our experience in dealing with that class of testimony that while you may convict on the uncorroborated testimony of an accomplice, still you should act on his testimony with great caution. Subject it to a careful examination in light of the other evidence in the case, and you are not to convict on such testimony alone unless satisfied after a careful examination of it's [sic] truth and that you can safely rely on it. What the law means about corroboration of the testimony of an accomplice is not merely corroboration of his narrative and mere details of how the crime was committed but some real and independent corroboration tending to implicate the accused in the commission of the offense charged. It is not sufficient to corroborate an accomplice as to the facts, generally. He should be corroborated as to some material fact which tends to prove that the accused was connected with the crime charged. A corroboration that merely raises a suspicion of guilt, because the accused had an opportunity is not sufficient.

This defendant is charged with the crime of first degree murder. First degree murder is the killing of a human being when the offender has a specific intent to kill or to inflict great bodily harm, and is engaged in the perpetration or attempted perpetration of armed robbery.

Armed robbery is the theft of anything of value from the person of another or which is in the immediate control of another, by use of force or intimidation while armed with a dangerous weapon, and whether the weapon used is dangerous within the meaning of the law is a question for the jury to decide, while considering not only the character of the weapon but by whom, upon whom, and in what manner it was used. It has been held that a piece of brick, an iron, a rod, a pipe, a gun, a knife or any such object might each be a dangerous weapon depending upon the manner used, and whether as used, it might be calculated or likely to produce death or great bodily harm.

The law with reference to the specific intent to kill or inflict great bodily harm is as follows:

First of all, the time element. The law knows no specific time within which an intent to kill or inflict great bodily harm must be formed so as to make a homicide murder. If the will of the person accompanies the act a moment antecedent to the act which causes the death, it will be as completely sufficient to make the offense murder as if it were a day or any other time.

It is sufficient if there was a design or determination to kill or inflict great bodily harm formed in the mind of the slayer at any moment before or at the time of the fatal blow.

If an assault is made upon a person, not with the intent of killing him but with the intent of inflicting great bodily harm, and death is caused by such assault, it is murder.

In such cases it is necessary that assault be of such a nature as would likely cause death or great bodily harm, and the death that resulted must have been the natural and probable consequence of the intentional act or acts.

An intnet [sic] to kill or inflict great bodily harm may be inferred from the facts and circumstances of a homicide.

A specific intent to kill would also be implied in any deliberate cruel act consciously committed by one person against another; if, for instance, a man armed with a deadly weapon should suddenly, with little or no apparent cause of [sic] provocation, kill another, the law would presume that such a killing was deliberate and intentional and done for the prupose [sic] of killing or inflicting great bodily harm.

Now, one of the lesser but possible verdicts in this case is that of second degree murder.

Second degree murder is the killing of a human being when the offender had a specific [sic] to kill or inflict great bodily harm, or where the offender is engaged in the perpetration or attempted perpetration of armed robbery, even though he has no intent to kill or inflict great bodily harm. So, the difference between the two is, is that in first degree it must be during an attempt or perpetration of an armed robbery where he has an intent to kill or inflict great bodily harm, or in second degree, if he is engaged in the attempted perpetration or perpetration of an armed robbery and he has no intent to kill, but death results, then that would be second degree murder. So, the difference between the two in that respect is the intent to kill or inflict great bodily harm. If it is present, it is first

degree murder, if it is not present, it is second degree murder.

Now, another lesser but possible verdict in this case is manslaughter, which is a homicide which would be murder if the offender had a specific intent to kill or inflict great bodily harm, but the offense is committed in sudden passion or heat of blood immediately caused by provocation sufficient to deprive an average person of his self-control and cool reflection. Provocation shall not reduce a homicide to manslaughter if the jury finds that the offender's blood had actually cooled, or that an average person's blood would have cooled, at the time the offense was committed.

Now, both the State and the defendant are entitled to the individual verdict of each one of you as jurors in this case.

Before I get to that, let me just say with regard to identification, in determining whether or not the defendant has been properly identified as the person who committed the offense charged against him, you should consider all the testimony in the case, both for the State and the defense, considering the means of identification, the circumstances under which he was identified, the opportunity for identifying the defendant, the description of he [sic] apparel or physical being as stated by the witness, and the probabilities or improbabilities that it was the defendant. Evidence in connection with an identification should be considered in connection with all the other evidence in the case, and if on all of the evidence there is a reasonable doubt, you should acquit. If there is not you should convict.

Now, as I have stated, both the State and the defendant are entitled to the individual verdict of each one of you as jurors. Under the law and your oath you must adhere to your verdict unless persuaded by one or more of your fellow jurors based upon some law, evidence or testimony you have heard during this trial. Only then may you change your verdict.

There are four possible verdicts in this case. Guilty as charged, which is guilty of frist [sic] degree murder, guilty of second degree murder, guilty of manslaughter, and not guilty.

The law requires that all twelve of you agree to reach any one of these four verdicts. When twelve of you so agree, you have reached a legal verdict. At that time, the foreman, whom you will select when you retire, using the four typewritten forms of the verdict on the top as a guide, will write in this area, word for word, whichever verdict you have reached, and place the signature on the line bearing the word, Foreman". [sic]

Go with the sheriff, please, and we will await your verdict.

MR. MEYER:

Your honor, before the jury leaves, I would like to ask for a special charge. May I approach the bench?

THE COURT:

You better come up here because I don't know if I am going to give what you are talking about. That should have been given to me before I started.

(Attorneys for the State and Defense approach the bench, out of the hearing of the jury.)

(Proceedings held in the presence of the jury.)

THE COURT:

In order to keep this as uncomplicated as possible, inadvertently, the District Attorney made a statement that if the man with whom they made a bargain ran out on him they would have no recourse. Without complicating it to the point where you won't understand what's happening, that is not correct. He would have had recourse if that would have been the case in this particular case, if those facts had been present, the District Attorney could have charged the man, if the man had, so called, run out on him. I merely want to correct that statement as an inadvertent statement by counsel in absence of knowing the absolute particular law on this point. That's all I want to make clear in your mind.

Go ahead and deliberate.

Supreme Court of Louisiana

STATE of Louisiana

v.

John L. SULLIVAN
No. 87-KA-0027

March 2, 1992

COLE, Justice.

Defendant John Sullivan was convicted by a jury of the first degree murder, during the perpetration of an armed robbery at a New Orleans bar, of Joseph King, a bar patron. The jury subsequently recommended imposition of the death penalty, a recommendation with which the trial court agreed. Sullivan now appeals both the conviction and the sentence on a myriad of grounds. For the reasons which follow, we affirm the conviction but vacate the death sentence and remand to the trial court for a new sentencing proceeding.

I.

On the evening of April 13, 1980, defendant Sullivan was in the Polka Dot Lounge on St. Charles Avenue in New Orleans. At about 10:30 p.m., Michael Hillhouse, who had arrived in New Orleans a few days earlier, entered the bar and began drinking beer. Sullivan introduced himself to Hillhouse, and the two continued talking and drinking. Sullivan asked Hillhouse if he wanted to make some quick money, and Hillhouse affirmed that he did so desire. Sullivan retrieved a black vinyl bag from behind the bar and returned to the table. He showed Hillhouse the bag which contained a sawed-off shotgun,

and Hillhouse agreed to commit an armed robbery with Sullivan.

At about 3:30 a.m., April 14, they left the bar and drove to the C-Note Lounge, also on St. Charles Avenue. They entered the lounge, went to the far end of the bar, and ordered beers. Hillhouse decided to play pool but had only a quarter, and the table required fifty cents. Joseph King, a regular patron of the bar, offered another quarter if he could play a game of pool with Hillhouse. The two played for about fifteen minutes. When the game ended, Hillhouse returned to his seat beside Sullivan, and King returned to his seat at the other end of the bar. Sullivan and Hillhouse moved to stools nearer the door.

Sullivan asked Hillhouse if he was ready. When Hillhouse said yes, Sullivan rose from his stool, backed up, raised the sixteen-gauge shotgun from beneath his coat, and shot King in the chest with a slug. The force of the blast knocked King off the stool and against the side wall, where he dropped to the floor. Sullivan reloaded the shotgun and ordered Hillhouse to the other end of the bar. Sullivan then placed the gun at the head of Mark Legorretta, another customer, and demanded his wallet. He took a gold watch off Legorretta's wrist. Sullivan next ordered Stephanie Lowery, the bartender, to empty the cash register. She took $150.20 from the register and gave it to Sullivan. Hillhouse joined Sullivan at the other end of the bar. The two men then backed out of the lounge and made good their escape in a stolen vehicle driven by Sullivan.

Sullivan gave Hillhouse $50.00 of the stolen money before emerging from the vehicle. Both men re-entered

the Polka-Dot Lounge, drank beer, and shot pool until dawn. Around sunrise, they proceeded to the A & J Restaurant on Prytania Street, where Sullivan dropped off Hillhouse. Sullivan left to secure the vehicle and to change clothes. He returned a half-hour later on foot, having washed and changed clothes. After drinking beer for a while, Sullivan invited Hillhouse to meet this "wife" (girlfriend), Brenda Wold. The two walked to an apartment on nearby Euterpe Street. While there, the three talked for a while and smoked marijuana. Hillhouse observed the sixteen-gauge shotgun lying on a bed. He also saw a blue, pinstriped vest that accompanied the suit Sullivan had worn earlier at the time of the crime. He asked Sullivan if he might wear it, and Sullivan agreed.

Sullivan and Hillhouse left the apartment, made purchases in a pawn shop, and proceeded to the Play Girl Lounge on Magazine Street. Police were summoned to the bar pursuant to a suspicious persons report. Sullivan had walked outside to check on the stolen vehicle when police officers arrived and realized he fit the description of one of the two suspects who had committed the robbery/homicide. They arrested him outside, entered the bar, recognized Hillhouse as fitting the description of the perpetrator, and arrested him as well. At the time of his arrest, Sullivan was wearing a gold watch on his left wrist.

Both men were taken into a police station and were questioned separately. Hillhouse confessed to the crime, led the officers back to Magazine Street, and showed them Sullivan's car. They then drove around the area until Hillhouse located the apartment where he had met Wold. The apartment was unoccupied at the time, and

officers were left on the scene to await Wold's return. Wold subsequently arrived and consented to a search of the apartment. An officer found the shotgun on the bed where Hillhouse had said it was located and also found both the suit jacket Sullivan had worn and the black vinyl flight bag in which the shotgun had originally been concealed.

At Sullivan's trial, Hillhouse, under a grant of total immunity from prosecution, testified he had willingly gone along with Sullivan's plan to make some quick money. He stated Sullivan had told him of the plan when they met in the Polka-Dot Lounge. Hillhouse asserted he had been shocked when Sullivan, for no apparent reason, shot King.

Lowery positively identified Hillhouse and Sullivan in court as the persons who had committed the armed robbery at the C-Note Lounge. She stated she did not see who had shot King, but after she heard the shot she ducked down behind the bar before looking up to see what had happened. She testified she saw Sullivan holding a shotgun to a customer's head. She identified the jacket taken from Wold's apartment as the jacket worn by Sullivan. Lowery admitted she was unable to identify Sullivan and Hillhouse at a physical line-up conducted on April 30, 1980, but was able to identify both Hillhouse and Sullivan five days later from a photograph of the line-up. She explained her inability to identify the two men initially resumed from fear and nervousness caused by the proximity of the men and the lighting in the room.

A balistics [sic] expert testified the slug removed from the body of King had been fired by the shotgun

which was found in Wold's apartment. He further testified the empty shell which had been left on the floor when Sullivan reloaded had been ejected from the same gun.

At the time of the trial, neither Legorretta, the bar patron robbed of his watch and wallet, nor Wold, was available. Thus, neither testified at trial.

Sullivan did not testify at the guilt phase of the trial. Against his counsel's advice, the defense elicited testimony from two Angola inmates and one Hunt inmate, all of whom had been incarcerated at the Orleans Parish Prison during the time Sullivan and Hillhouse had been there. The testimony concerned allegations that Hillhouse had been beaten by police and forced to confess to the crime and to implicate Sullivan. On rebuttal, the state recalled Hillhouse, who testified he had not been beaten or forced to confess and the injuries he had sustained while in custody had resulted from falls occurring during epileptic seizures.

The jury found Sullivan guilty as charged of first-degree murder, in violation of La. Rev. Stat. § 14:30(A)(1).[1] The next day, the penalty phase of the trial was conducted. Against the advice of counsel, and after a hearing in chambers, Sullivan insisted on testifying. He told the jury the death penalty was warranted under the circumstances and requested the jury to recommend it. At

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[1] First degree murder is "the killing of a human being: . . . [w]hen the offender has specific intent to kill or to inflict great bodily harm and is engaged in the perpetration or attempted perpetration of . . . armed robbery. . . ." La. Rev. Stat. § 14:30(A)(1).

the conclusion of the proceeding, the jury recommended the death penalty.

After several post-verdict motions and two prior remands by this Court for evidentiary hearings on motions for a new trial, Sullivan appeals his conviction and sentence, asserting numerous assignments of error.

II.

Sullivan first contends the state withheld exculpatory material he had sought when it failed to provide him with a copy of the initial police report containing a description of both perpetrators. This, he contends, deprived him of a fair trial. Sullivan asserts there is a significant difference between the description of the perpetrator who wielded the shotgun given by bartender Stephanie Lowery to the investigating officers and the appearance of Sullivan at the time of his arrest.

The initial police report contains seven pages and the material to which Sullivan refers is on page four where the reporting officer put a brief description of the perpetrator. In addition to writing the estimated height, weight, age, race, and gender, the officer checked off spaces next to general characteristics. One check indicated "straight" hair. Another indicated "shoulder" length. In the area for facial hair description, the officer checked "mustache." Sullivan contends he had "shortish curly hair and no mustache . . . when he was arrested only hours after the crime was committed." Sullivan maintains these check mark general description factors are exculpatory and should have been disclosed.

The state is required to provide to the defense any information in its possession which is favorable to the accused *and* is material to guilt. *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed.2d 215 (1963). This, of course, includes exculpatory and impeachment information and the "evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *United States v. Bagley*, 473 U.S 667, 682, 105 S. Ct. 3375, 3383, 87 L. Ed.2d 481 (1985); *see also State v. Knapper*, 579 So. 2d 956, 959 (La. 1991).

The evidence in this case does not rise to the level of materiality found in *Knapper*. Assuming Lowery was the sole source of information upon which the officer had based his initial report, the evidence in the initial report has limited impeachment value. Lowery was able to identify Sullivan, both in court and from a photograph of the line-up. It is true that Lowery's identification of both Sullivan and Hillhouse was open to question because of her inability to identify them at the physical line-up and because she admitted to having chosen "in her mind" subjects other than Sullivan and Hillhouse. Notwithstanding the damage to Lowery's testimony regarding the line-up identification, her in-court identification may have independent criteria for reliability. *See State v. Winn*, 412 So. 2d 1337 (La. 1982); *State v. Stewart*, 389 So. 2d 1321 (La. 1980).

In addition, Lowery's inaccurate description of the gunman did not directly contradict the testimony of Hillhouse. Hillhouse's credibility, albeit qualified by his deal

with the state, would not have been damaged by a revelation that Lowery had given an imprecise description of the gunman. At most, Lowery's own credibility would have been further weakened, diminishing the value of her corroborative testimony.

Such a reduction in her corroborative value would not have interjected a reasonable doubt which otherwise had not existed. Unlike the situation in *Knapper, supra,* Hillhouse's testimony had other sources of corroboration. The murder weapon was found in the apartment shared by Sullivan and his girlfriend; the suit jacket worn by defendant during the robbery and killing was also found there; the gold watch allegedly taken from Legorretta was found on defendant's wrist when he was arrested later that day; and, the two men were arrested in close proximity later that day. In light of this supporting and corroborating evidence, a further weakening of Lowery's testimony would not have affected the jury's reliance of the testimony of Hillhouse. We conclude, under the *Bagley* standard, the check marks and brief description contained in the initial police report were not material to guilt and could in no way have created a reasonable doubt.

Sullivan also suggests the information was of "indirect materiality." He asserts Lowery's description of the killer gives reason to pursue his and trial counsel's original speculation, otherwise unsubstantiated, that a man named William O. Williams a/k/a George Simp a/k/a "Cookie" actually killed Joseph King.[2]

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[2] Williams was, himself, killed on May 6, 1980, some three weeks after the homicide at the C-Note Lounge.

This argument is without merit. Despite the assertions of trial counsel that he would have investigated further had he had the description, it is clear that at the time of the killing of King the description given by Lowery does not fit a contemporaneous photograph of Williams. In Exhibit D-3, a photograph of Williams taken 10 days after the C-Note robbery and homicide, Williams has dark, curly, collar-length hair, a thick moustache, and a goatee. The goatee and moustache are distinctive characteristics not easily missed. Additionally, Williams's hair cannot be described as straight or shoulder-length. It is not likely, then, that Williams in April 1980 could have been confused with Sullivan.

Assertions that the existence of an imprecise description of the gunman from Lowery would have resulted in the discovery of evidence implicating Williams as the real killer, based as they are on hearsay, amount to no more than unfounded speculation. Absent independent evidence directly linking Williams to the crime, Sullivan cannot show a reasonable doubt now exists with respect to his guilt.

III.

Sullivan next contends his trial counsel rendered constitutionally ineffective assistance at the guilt phase of the trial. He raised the issue first in a *pro se* motion for a new trial and subsequently by appellate counsel's motion to remand. He now maintains the discovery in the course of the *Brady* presentation of the previously unknown evidence of Williams's involvement establishes what a thorough preparation of the case might have revealed. He

asserts the state's suppression of the material sought was initially responsible for the failure to present the evidence, but, to the extent this failure was not attributable to the asserted *Brady* violation, responsibility must be charged to trial counsel's failure to prepare and investigate the case. He charges counsel met with him only three times before trial for about three hours; he did not interview, either personally or through an investigator, any witnesses on the state's witness list; and he made no effort to obtain medical records that might document the injuries suffered by Hillhouse while in police custody.

At the outset, we note

> [w]hen a claim of ineffective assistance of counsel is raised on appeal, the issue is generally referred to post-conviction proceedings in which both sides can introduce evidence and the validity of the claim can be properly determined. A narrow exception to this general rule of deferring ineffective assistance claims to post-conviction proceedings has been recognized when "the record discloses evidence needed to decide the issue of ineffective assistance of counsel and that issue was raised by assignment of error on appeal, in the interest of judicial economy."

State v. Wille, 559 So. 2d 1321, 1339 (La. 1990) (quoting *State v. Ratcliff*, 416 So. 2d 528, 530 (La. 1982)). Given the extensive evidentiary hearings conducted in this case to date, we believe the record discloses all the evidence required to reach a decision and therefore we will not refer the issue to post-conviction proceedings.

To establish a claim of ineffective representation, "the defendant must [first] show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment." *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 2063, 80 L. Ed.2d 674 (1984). In other words, a defendant must demonstrate that counsel's performance was not "within the range of competence demanded of attorneys in criminal cases." *McMann v. Richardson*, 397 U.S. 759, 771, 90 S. Ct. 1441, 1449, 25 L. Ed.2d 763 (1970). Next, the defendant must show his counsel's deficient performance prejudiced his defense by depriving him of a fair trial, that is, "a trial whose result is reliable." *Strickland*, 466 U.S. at 686, 104 S. Ct. at 2064. The inquiry is whether, but for counsel's unprofessional errors, there is a reasonable probability the outcome of the trial would have been different. 466 U.S. at 695, 104 S. Ct. at 2068.

As revealed in the evidentiary hearings, Sullivan's trial counsel, Joseph Meyer, had taken over the case from his prior counsel, Robert Zibilich, who had personality problems with Sullivan. Zibilich had represented Sullivan for nearly two years, had made extensive pre-trial preparations, and had completed everything procedurally. Meyer's preparation for the trial, therefore, would not have been as extensive as would have been required otherwise.

Meyer testified that the principal witnesses for the state were Hillhouse and Lowery. Hence, he concentrated his efforts on destroying their credibility. He did obtain a photograph of Williams and had spoken with an A & J Restaurant waitress who would have testified she had

seen defendant, Hillhouse, and Williams together at the restaurant. Meyer chose not to put the waitress on the stand because her testimony corrobated that of Hillhouse by placing the two men together on the morning of the murder.

Sullivan also alleged his girlfriend, Brenda Wold, should have testified and her testimony would have been to the effect that she and Sullivan had been together at her apartment at 7:15 a.m. when Hillhouse arrived there wanting to speak with Sullivan; Hillhouse had asked her if he could leave his flight bag there while he was offshore; Sullivan had said he would meet Hillhouse at the A & J Restaurant; and she had written letters to this effect in April 1980. In fact, Wold was unavailable to testify because she was in Puerto Rico at the time. In 1984, at one of the hearings on defendant's motion for a new trial, Wold stated she had, at Sullivan's direction, falsified the letters. She testified she had known these to be lies and would never have testified to them at trial. Her version of the events the morning of the killing are directly corrobative of Hillhouse's testimony and would have been extremely beneficial to the state.

Meyer was able, through cross-examination and argument to cast doubt on various aspects of the state's case. He stressed the "sweetheart" deal Hillhouse had received from the state and how a snitch would have said anything in return for avoiding a certain second degree murder conviction. He suggested Hillhouse may have been the killer. As suggested Hillhouse may have been the killer. As suggested by Sullivan, he also presented the testimony of the three prisoners who testified Hillhouse was beaten in order to obtain a confession. Meyer also

effectively cast suspicion on the source of the gold watch allegedly taken during the robbery and found on defendant's wrist at the time of his arrest. Nevertheless, while Meyer was able to impeach Lowery's identification testimony, he was never able to discredit the testimony of Hillhouse.

We acknowledge this case was plagued by the unwillingness and unavailability of various key witnesses, namely Legorretta and Wold. It is abundantly clear, however, that had these two witnesses testified the state's case would have been stronger rather than weaker. Sullivan was actually in a *more desirable* position fighting a weaker case than he should have been attempting to fight a stronger one. We conclude Sullivan has both failed to establish even one error on the part of his trial counsel under the *Strickland* standard and suffered no prejudice at the guilt phase of the trial as a result of anything his counsel either did or failed to do.

IV.

Sullivan next asserts the jury was given an instruction on specific intent which required it to presume such intent on the facts of this case. The instruction thus, according to Sullivan, unconstitutionally shifted the burden of proof to the defendant, in violation of *Sandstrom v. Montana*, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979). Sullivan focuses on the portion of the charge in which the trial judge provided an example for the jury. The judge stated:

> An [intent] to kill or inflict great bodily harm may be inferred from the facts and circumstances of a homicide. A specific intent to kill would also be implied in any deliberate cruel act consciously committed by one person against another; if, for instance, a man armed with a deadly weapon should suddenly, with little or no apparent cause o[r] provocation, kill another, the law wouid presume that such a killing was deliberate and intentional and done for the purpose of killing or inflicting great bodily harm.

Trial transcript, vol. 3, p. 573. Sullivan contends the charge becomes less and less permissive as it progresses, concluding in a mandate to the jury that it, too, must presume intent in this case. He also asserts the remainder of the charge does nothing to counteract the shifting of the burden of proof and the error is not harmless on this evidentiary record.

A jury instruction which creates a presumption of specific intent violates the requirement of the due process clause of the 14th Amendment that the state prove each element of a crime beyond a reasonable doubt. *Sandstrom, supra,* at 513, 99 S. Ct. at 2453, 2459; *see also State v. Hamilton,* 478 So.2d 123, 128 (La. 1985), *cert. denied,* 478 U.S. 1022, 106 S.Ct. 3339, 92 L. Ed.2d 743 (1986). *Sandstrom* violations, however, are subject to the harmless error standard enunciated in *Chapman v. California,* 386 U.S. 18, 87, S. Ct. 824, 17 L. Ed.2d 705 (1967), i.e., whether it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained. *Yates v. Evatt,* 500 U.S. ___, 111 S. Ct. 1884, 1892, 114 L. Ed.2d 432 (1991). It is crucial "to ascertain from the trial

court's instructions that the jurors, as reasonable persons, would have considered the entire trial record, before looking to that record to assess the significance of the erroneous presumption." 111 S. Ct. at 1894.

Taken alone, the presumptive example in the jury charge may so narrow the jurors' focus as to leave it questionable that they looked to evidence other than that establishing the predicate before inferring specific intent. The trial judge, however, clearly instructed the jury to consider the "facts and circumstances of [the] homicide," before inferring the intent to kill or inflict great bodily harm. In addition, the judge stated specific intent would be implied when a person "*consciously* commit[s]" "any *deliberate* cruel act" before reciting his presumptive example. The tone of the instruction is that only after the jury has considered all relevant facts and circumstances presented to them, and then found the facts establishing the presumption, may the jury infer specific intent existed to kill or inflict great bodily harm. Under the court's charge on specific intent, read in its entirety, those circumstances considered by the jury included the finding that defendant had acted "consciously" and "deliberate[ly]." In this light, a reviewing court could readily find a reasonable juror would have looked to other evidence bearing on the fact subject to the presumptive example, i.e., intent to kill or inflict great bodily harm.

Unlike the evidence in *Yates,* and more similar to the evidence in *Hamilton,* the evidence in this case clearly indicates Sullivan, from a short distance away, deliberately pointed the shotgun at the victim's chest and fired. This evidence overwhelmingly supports finding beyond a reasonable doubt Sullivan had the specific intent to kill or

inflict great bodily harm. There is no evidence to suggest the shooting was accidental or unintentional.

Because the evidence enables us to determine beyond a reasonable doubt the verdict resting upon it would have been the same in the absence of the presumption given by the trial judge, we conclude the instruction on specific intent, even if erroneous, did not contribute to the jury's verdict. *Chapman, supra; State v. Gibson*, 391 So. 2d 421 (La. 1980).

V.

Sullivan next argues the jury instruction on reasonable doubt undermined the level of assurance in the outcome of both the guilt phase and the penalty phase of the trial required by the due process clause, in violation of *Cage v. Louisiana*, 498 U.S. ___, 111 S. Ct. 328, 112 L. Ed.2d 339 (1990). The state concedes the charge was essentially the same as the charge found to be improper in *Cage*.[3] The question for our resolution, therefore, is

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[3] The instruction at issue provided

> If you entertain any reasonable doubt as to any fact or element necessary to constitute the defendant's guilt, it is your sworn duty to give him the benefit of that doubt and return a verdict of acquittal. Even where the evidence demonstrates a probability of guilt, yet if it does not establish it beyond a reasonable doubt, you must acquit the accused. This doubt must be a reasonable one; that is, one founded upon a real, tangible, substantial basis, and not upon mere caprice, fancy or conjecture. It must be such a doubt as would give rise to a *grave uncertainty*, raised in your minds by reason of the unsatisfactory character of the evidence; one that would make you feel that you had not an abiding conviction to a *moral certainty* of the defendant's guilt. If, after giving a fair and impartial consideration to all of the facts in the case, you find the evidence unsatisfactory upon any single point indispensably necessary to constitute the defendant's guilt, this would give rise to such a reasonable doubt as would justify you in rendering a verdict of not guilty. A reasonable doubt is not a mere possible doubt. It should be an actual or *substantial doubt*. It is such a doubt as a reasonable person would seriously entertain. It is a *serious doubt*, for which you could give good reason.

Trial transcript at 566-68 (emphasis added).

whether it appears beyond a reasonable doubt that the erroneous instruction did not contribute to the jury's finding of guilt. *See State v. Cage*, 583 So. 2d 1125 (La.), *cert. denied*, 502 U.S. ___, 112 S. Ct. 211, 116 L. Ed.2d 170 (1991). Compared to *Cage*, Sullivan asserts, the evidence of guilt in this case is not overwhelming.

We find Sullivan's assertions without merit. Despite Sullivan's best attempts to characterize the state's case as a "chain of weak links," the testimony of Hillhouse fingering Sullivan as the leader and triggerman remains unrefuted, even in light of the deal given him in exchange for his testimony. Whatever the weight given Lowery's identification of Sullivan in the photograph of the line-up and in her identification of Sullivan at trial, other evidence, albeit circumstantial, corroborates Hillhouse's version of the facts. The murder weapon, the flight bag, and the suit jacket worn by Sullivan during the crime were later found at the apartment shared by Sullivan and Wold. It was to this apartment that Sullivan had brought Hillhouse to meet his "wife" the morning of the murder.

The evidentiary record clearly supports a finding that the erroneous instruction was harmless beyond a reasonable doubt. *See Chapman, supra; Gibson, supra.* In light of this evidence, the impact of the erroneous instruction could not have affected the jury's deliberation as to Sullivan's guilt. Given our disposition of the death sentence recommended by the jury, *see infra* at section XII, it is unnecessary to resolve the challenge of the erroneous instruction as it applied to the penalty phase of the trial.[4]

VI.

Sullivan next argues the state's opening statement at the penalty phase and the jury instructions in the penalty phase erroneously suggested to the jury that a death penalty is automatic upon a finding of an aggravating circumstance and did not clearly indicate such a finding merely authorized a jury to consider the appropriateness of the death penalty. He asserts the prosecutor misstated the applicable law and the judge's instructions did not alleviate the problem by providing a clear and unambiguous statement of the law and the jury's responsibilities. Sullivan then concludes this requires vacating the death sentence. Because of our disposition of the death sentence, *see infra* at section XII, we find it unnecessary to address this issue.

VII.

Sullivan contends that in the course of voir dire the trial court first discouraged certain questioning and then

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[4] We are confident that a jury instruction such as this one will not be used in future criminal proceedings.

refused to allow defense counsel to examine fully the prospective jurors relative to their unwillingness to return a death penalty. He argues the trial judge refused to allow his counsel sufficient latitude necessary to explore fully the attitudes and opinions of those prospective jurors who initially declared to the prosecutor an inability to return a death penalty for religious reasons. He contends he was denied his right to a full voir dire and the state benefitted[sic] from more challenges than it was entitled as well as from a pro-death jury.

A defendant's right to an impartial jury prohibits the exclusion of venire members "simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction." *Witherspoon v. Illinois,* 391 U.S. 510, 522, 88 S. Ct. 1770, 1777, 20 L. Ed.2d 776, 1968. Currently, the standard for determining whether a prospective juror may be excluded for cause because of his views on the death penalty is "whether the juror's views [on capital punishment] would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.' " *Wainwright v. Witt,* 469 U.S. 412, 424, 105 S. Ct. 844, 852, 83 L. Ed.2d 841 (1985); *see also* La. Code Crim. Proc. art. 798. The exclusion of potential jurors must be limited to those who are "irrevocably committed . . . to vote against the death penalty regardless of the facts and circumstances that might emerge in the course of the proceedings" and to those whose views prevent them from making an impartial decision on the question of guilt. *Witherspoon,* 391 U.S. at 523 n.21, 88 S.

Ct. at 1777 n.21; *State v. Copeland*, 530 So. 2d 526, 532-33 (La. 1988).

When a juror is challenged for cause because of his answers concerning the death penalty, defense counsel must be given the opportunity to traverse the juror for rehabilitation. *State v. David*, 425 So. 2d 1241, 1249 (La. 1983). A full review of the voir dire reveals that at no time was defense counsel ever prevented from attempting to rehabilitate any of the fifteen jurors who had expressed unwillingness to impose the death penalty. The only questions for the trial court were whether the juror would automatically vote against the death penalty regardless of the facts or circumstances presented at trial and whether the juror's attitude toward the death penalty would have prevented him from making an impartial decision as to the defendant's guilt. *State v. Celestine*, 443 So. 2d 1091 (La.), *cert. denied*, 469 U.S. 873, 105 S. Ct. 224, 83 L. Ed.2d 154 (1983). Under that standard, the trial court properly excluded the prospective jurors.

Sullivan also asserts the trial court erred in excluding jurors who could have been fair and impartial on the issue of guilt despite their predisposition against the death penalty. This contention is meritless. Exclusion of prospective jurors who are properly excluded under *Witherspoon* from the jury that decides guilt or innocence in a bifurcated trial does not violate a defendant's 6th Amendment rights. *Lockhart v. McCree*, 476 U.S. 162, 106 S. Ct. 1758, 90 L. Ed.2d 137 (1986). We have previously rejected the notion that so-called death qualified jurors are conviction-prone. *State v. Ward*, 483 So. 2d 578 (La.), *cert. denied*, 479 U.S. 871, 107 S. Ct. 244, 93 L. Ed.2d 168

(1986); *State v. Jones*, 474 So. 2d 919 (La. 1985), *cert. denied*, 476 U.S. 1178, 106 S. Ct. 2906, 90 L. Ed.2d 992 (1986).

VIII.

Sullivan maintains the prosecutor, in his rebuttal, improperly commented on Sullivan's failure to testify, thus violating his right against self-incrimination. A trial court "shall" declare a mistrial when the prosecutor "refers directly or indirectly to . . . [t]he failure of the defendant to testify in his own defense. . . . " La. Code Crim. Proc. art. 770(3). *See Griffin v. California*, 380 U.S. 609, 85 S. Ct. 1229, 14 L. Ed.2d 106 (1965) (references to a defendant's invocation of 5th Amendment right to silence are unconstitutional). Not all purported indirect references, however, require that a mistrial be ordered. *State v. Johnson*, 541 So. 2d 818, 822 (La. 1989).

In the remark at issue, the prosecutor argued

> is it coincidental that [Hillhouse] was arrested with John Sullivan several feet away in the same place? Is it coincidental that Detective Gifford and Detective Meyers were called to the Play Girl Lounge, not for one person but for two people and they found Michael Hillhouse and John Sullivan? Is it coincidental that Mrs. [Lowery] talked about two people and not one, two people and at no time and even in Mr. Meyer's argument, and I ask you to consider this, at no time in his argument does he at anytime say that John Sullivan is not in that bar?

Trial transcript, vol. 3, pp. 563-64.

It is clear the remark in this case is not an impermissible reference to Sullivan's failure to take the stand.

Taken in the context of the rest of the prosecutor's argument, the statement is a comment on the fact that the state's case was uncontroverted by any evidence presented to the jury. Because the statement does not focus the jurors' attention upon defendant's failure to testify in his own behalf, the argument is without merit.

IX.

Sullivan asserts the state's argument appealed to passion and prejudice at both phases of the trial. In the guilt phase, he complains about the following statement made during rebuttal:

> Mr. Meyer said, "Say no to Michael Hillhouse, say no to Michael Hillhouse, we are not going to buy that story." I submit to you, ladies and gentlemen that you shouldn't say no to Joe King, you shouldn't say no to Joe King. He was a person and he had rights just like you and me. He may not have accomplished much in his life and maybe li[k]e Mrs. L[o]wery said, he was a fixture at this bar, but he certainly had a right to live. Don't say yes to John Sullivan, good-by, don't say yes to John Sullivan.

Trial transcript, vol. 3, pp. 549-50.

Sullivan argues the worth of the victim is not relevant to whether Hillhouse was worthy of belief. Rather, he argues, the prosecutor's comment implies he knew Sullivan was guilty and had to make the deal to get the more culpable party.

Prior to the quoted statement, the prosecutor had conceded that without Hillhouse's testimony the state had absolutely nothing. He then explained why the state had made a deal with Hillhouse even though his confession to the police evidenced guilt of second degree murder. He noted

> I had to make a decision to whether or not the guy went into the C-Note Lounge with this thing and snuffed out the life of Joe King, whether or not I will allow him to go back out there, walk the streets. That's a decision I had to make.

Trial transcript, vol. 3, p. 549.

In this context, the statement to which Sullivan now objects, neither improperly refers to evidence outside the record developed at trial nor vouches for the credibility of the witness. *See State v. Smith*, 554 So.2d 676 (La. 1989). In addition, the statement does not inject an extraneous issue into the trial. The bargain made with Hillhouse in exchange for his testimony was a prime focus of defense counsel's closing argument. While the statement may have approximated a victim impact statement made during the guilt phase of the trial, it was clearly not outside the scope of rebuttal argument.

Sullivan also objects to a statement made by the prosecutor during the penalty phase of the trial. Given our disposition of the penalty phase of the trial, *see infra* at section XII, we find it unnecessary to reach the issue.

X.

Sullivan contends, in a footnote in his brief, that "the cumulative effect of [the] violations of [his] rights was a denial of due process and fundamental fairness." He

asserts the record is replete with examples of the trial court interrupting and curtailing examination by defense counsel, engaging in examination of witnesses in a manner which would be objectionable if done by counsel, and interposing objections where the prosecution failed to do so. While he concedes "many of these practices may not be error in each instance," Sullivan maintains "the cumulative effect may well have been prejudicial."

We disagree. A thorough review of the record reveals no pattern of abuse by the trial court. In fact, the court, in some instances, interrupted in an effort to assist the *defense*. That the trial, from voir dire to the return of the verdict, lasted only one day is not significant. The jury was sent to deliberate at 9:30 p.m. and returned a verdict at 10:26 p.m. The facts of the case were neither complex nor extensive. Thus, a prolonged period of deliberation could not have been expected. Sullivan provides no testimony from jurors that they were too tired to function or any evidence they had sought a recess. In short, there is nothing in the record which would support a finding that the guilt phase of Sullivan's trial was fundamentally unfair or violated his right to due process of law.

XI.

Because this a capital case, we will address Sullivan's other, unbriefed, assignments or error, raised by his previous counsel as well as one raised by Sullivan *pro se*.

A.

Sullivan contends the trial court erred in allowing a police officer to testify Wold had executed a consent to

search form when neither the original of the form nor Wold herself was available.

If Sullivan is alleging no consent to search was given and, therefore, the search was unlawful, such an argument, as well as evidence establishing lack of consent should have been presented by Sullivan at the hearing on the motion to suppress. *State v. Scott*, 307 So. 2d 291 (La.1975). The validity of the consent to search form was not an issue at trial. *See* La. Code Crim. Proc. art. 703(F). In any event, Wold testified in 1984 she had consented to the search.

Sullivan appears to be making a best evidence or hearsay argument, as counsel did object at trial to any mention of the consent to search form on grounds it was a photocopy and the person who had executed the document was not available to be cross-examined. This argument is meritless. The prosecutor stated the original consent form was unavailable, and Wold was, at the time of trial, in Puerto Rico. Because the photocopy is the substantial equivalent of an original, its admission did not violate the best evidence rule (at that time La. Rev. Stat. § 14:436) in the absence of a showing the copy did not accurately reflect the original. *State v. Stuart*, 344 So. 2d 1006 (La. 1977). Defense counsel, having an opportunity to crossexamine the officer who provided the consent form, made no showing that the copy did not accurately reflect the original.

B.

Sullivan asserts the trial court erred in refusing to admit into evidence a prior statement of Hill house [sic].

The record reflects that on recross Hillhouse admitted making the statement and that it was inconsistent with his trial testimony. When a witness admits making a prior inconsistent statement, the prior statement is not independently admissible. La. Rev. Stat. § 15:493; *State v. Williams*, 455 So. 2d 1171 (La. 1984). The trial court did not err in so concluding.

C.

Sullivan's original appellate counsel briefed the issue raising the contention there was insufficient evidence to sustain a conviction for first degree murder. Rather, he maintains, the evidence at most supported a conviction for second degree murder. He argues the state failed to prove he had possessed the specific intent to kill or inflict great bodily harm upon the victim. He indicates Hillhouse testified there had been no discussion of violence. He also asserts Lowery had her back turned at the time of the shooting and could not have seen exactly what transpired, despite attesting that the victim had neither reached for a weapon nor provoked the attack.

The state was required to prove, beyond a reasonable doubt, Sullivan killed King and had the specific intent to kill him or to inflict great bodily harm while engaged in the perpetration or attempted perpetration of an armed robbery. La. Rev. Stat. § 14:30(A)(1). An armed robbery is the taking of anything of value belonging to another from the person of another or that it is in the immediate control of another by use of force or intimidation and while armed with a dangerous weapon. La. Rev. Stat. § 14:64.

The evidence clearly supports a finding the killing was committed during the course of an armed robbery. Hillhouse testified Sullivan entered the bar while armed with a sawed-off shotgun with the intent to commit an armed robbery. After asking Hillhouse if he were ready, Sullivan got off the stool, took a couple of steps back, pulled the shotgun up, and shot King. Sullivan then reloaded the gun, told everyone it was a holdup, and demanded all the money. Both Lowery and Hillhouse testified Sullivan, while holding the shotgun to the head of Legorretta, robbed him of his wallet and watch. Sullivan further demanded Lowery hand over the cash from the register. On these facts there is no doubt the "armed robbery was an immediate concomitant of the murder and formed, in conjunction with it, one continuous transaction." *State v. Williams*, 383 So. 2d 369, 372 (La. 1980), *cert. denied*, 449 U.S. 1103, 101 S. Ct. 899, 66 L. Ed.2d 828 (1981).

These facts also support a finding Sullivan had possessed the intent to kill or to inflict great bodily harm upon the victim. The deliberate pointing and firing of a shotgun at a victim at point-blank range is sufficient to establish beyond a reasonable doubt the element of specific intent to kill or to inflict great bodily harm. *State v. Neslo*, 433 So. 2d 73 (La. 1983).

Viewing all the evidence in the light most favorable to the prosecution, a rational fact-finder could have found, beyond a reasonable doubt, Sullivan had killed King with the specific intent to kill or inflict great bodily harm while engaged in the perpetration of an armed robbery. *See Jackson v. Virginia*, 443 U.S. 307, 99 S. Ct. 2781,

61 L. Ed.2d 560 (1979). Hence, this argument is without merit.

D.

Sullivan asserts the evidence is insufficient to sustain a jury finding that the killing was especially cruel, atrocious, or heinous and the death penalty cannot be based on a system of double-counting, where the armed robbery both elevates the crime to first degree murder and also sustains the imposition of the death penalty. Given our disposition of the penalty phase of the trial, *see infra* at section XII, it is unnecessary to address these contentions.

E.

Sullivan maintains the trial court erred in denying his first motion for a new trial filed on June 10, 1982, and the *pro se* supplement filed on June 17, 1980. We have already discussed all issues implicated by this motion. Further discussion is, therefore, unnecessary.

F.

In an unbriefed assignment of error, filed *pro se*, Sullivan alleges the transcripts have been tampered with, altered, and padded with testimony that never existed. A review of the record in the case reveals no evidence of tampering. This argument is meritless.

XII.

Finally, Sullivan contends his trial counsel rendered constitutionally ineffective assistance at the penalty phase

of the trial. We previously remanded for an evidentiary hearing on this issue. *State v. Sullivan*, 559 So. 2d 1356 (La. 1990). On remand, the court ruled orally that while defense counsel's failure to prepare for the penalty phase of the trial was wrong, and that "anytime . . . a defendant is charged with first degree murder, defense counsel has to prepare on the basis that a guilty verdict may be returned[,]" nonetheless, based upon the circumstances of the crime, "the result would not have changed if all the other evidence had been admitted." Hence, the court concluded Sullivan suffered no prejudice as a result of his trial counsel's failure to prepare.

Sullivan asserts his trial counsel's failure to provide effective assistance was total and complete because nothing whatsoever was done to investigate, to evaluate, or to prepare a mitigation defense.[5] He contends the failure to prepare and present a mitigation defense amounted to a breach of counsel's duty to conduct a reasonable investigation, including an investigation of his background for possible mitigating evidence.

In evaluating a claim of ineffective assistance of counsel during the penalty phase of a capital case, we

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[5] Such a defense is imperative, under the circumstances, because the Louisiana death sentencing provision requires the jury to consider evidence of mitigating circumstances before imposing the death penalty. La. Code Crim. Proc. art. 905.3. One of the mitigating circumstances the jury may consider is that "[a]t the time of the offense the capacity of the offender to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect or intoxication." La. Code Crim. Proc. art. 905.5(e).

must first determine whether a reasonable investigation would have uncovered mitigating evidence. *State ex rel. Busby v. Butler*, 538 So. 2d 164, 169 (La. 1988). If such evidence could have been found, we must consider whether counsel had a tactical reason for failing to put the evidence before the jury. *Id.* Where mitigating evidence is not presented to the jury because of counsel's tactical choice, a defendant must overcome the strong presumption that, under the circumstances, the challenged action might be considered sound trial strategy. *Id.* If it is determined counsel's actions were not taken for tactical reasons or if the tactical reasons were unreasonable, we must then assess whether the defendant suffered actual prejudice from counsel's ineffectiveness. *Id.* As we have previously noted, "[t]he benchmark . . . for judging any such claim must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Busby, supra*, at 167 (citing *Strickland, supra*, 466 U.S. at 686, 104 S. Ct. at 2063).

We note at the outset Sullivan's trial counsel, in the evidentiary hearing, candidly admitted he failed to prepare for the penalty phase of the trial because he "arrogan[tly]" thought the jury would return only a second degree murder conviction, thereby precluding a penalty phase.[6] Given the facts of this case, we believe his assumption to have been unreasonable. We agree with the court which conducted the evidentiary hearing that any

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[6] Statements in this context by former counsel are subject to careful scrutiny given they are conducive to accomplishing the original defense goals of trial and sentencing.

time a defendant is charged with first degree murder, defense counsel must prepare for the eventuality that a guilty verdict may be returned. *See Blake v. Kemp*, 758 F.2d 523, 533 (11th Cir.), *cert. denied*, 474 U.S. 998, 106 S. Ct. 374, 88 L. Ed.2d 367 (1985) (attorney who fails to make preparation for penalty phase deprives client of reasonably effective assistance of counsel).

A.

We conclude in this case a reasonable investigation would have uncovered mitigating evidence. Counsel would have been able to put before the jury the fact Sullivan was raised in an abusive, alcoholic, often brutal environment. Sullivan's mother and sisters, had they been contacted, would have testified at length and corroborated the details of Sullivan's turbulent childhood. They also would have told the jury they loved him and pleaded with the jury to spare his life.

Further inquiry by Sullivan's counsel would have proved the existence of mental illness and explained its significance. The records of Sullivan's 1968 hospitalization for schizophrenia were readily accessible at the time of the trial. Those records would have provided the basis for current evaluations and expert testimony to confirm the continued existence of the disease and to interpret to a jury how it continues to affect him today. While the jury heard from Sullivan that the [sic] had once been diagnosed as schizophrenic, there was no elaboration by experts as to the significance of the diagnosis, nor was there an explanation made to the jury that while Sullivan may appreciate the difference between right and wrong at

an intellectual level, his disease prevents him from integrating the knowledge to the other, emotional side of his personality. Experts who testified at the evidentiary hearing indicated that in stressful situations Sullivan disassociates into a fantasy world and cannot differentiate fantasy from reality. Certainly this is the type of evidence contemplated by La. Code Crim. Proc. art. 905.5(e), and it is evidence readily available had any reasonable investigation been undertaken.

B.

We next conclude there can be no tactical reason for defense counsel's failure to put this evidence before the jury. "Strategic choices made after less then complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Busby, supra*, at 171 (citing *Burger v. Kemp*, 483 U.S. 776, 794, 107 S. Ct. 3114, 3126, 97 L. Ed.2d 638 (1987)).

Counsel's frank admission in the evidentiary hearing that he conducted no investigation whatsoever because of his abiding faith in his ability to obtain nothing more severe than a second degree murder conviction negates any assumption trial strategy motivated the decision to keep this evidence from the jury. Rather, it was counsel's complete failure to perform his duty to investigate that resulted in the jury's not having the benefit of the mitigating evidence, evidence which was both relevant and admissible. *See Lockett v. Ohio*, 438 U.S. 586, 605-06, 98 S. Ct. 2954, 2965, 57 L. Ed.2d 973 (1978). Under these circumstances, then, we conclude the level of representation

Sullivan received at the penalty phase of the trial amounted to constitutionally ineffective assistance of counsel.

C.

Having concluded the assistance provided Sullivan at the penalty phase was constitutionally ineffective, we must still determine whether, but for counsel's errors, there is a reasonable probability the result of the proceeding would have been different, i.e., whether Sullivan suffered actual prejudice as a result. *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068. We respectfully disagree with the trial court's conclusion the result would not have been different had the jury heard the evidence in mitigation.

In *Busby, supra*, we found if the mitigating circumstance of mental impairment had been established, the degree of likelihood a jury would not have recommended a death sentence is sufficient to undermine confidence in the outcome of the penalty phase of the trial. *Id.* at 172. Such evidence has the potential to change totally the evidentiary picture by altering the causal relationship which can exist between mental illness and homicidal behavior. *Busby, supra*, at 173. "Psychiatric mitigating evidence not only can act in mitigation, it also can significantly weaken the aggravating factors." *Id.* (citing *Middleton v. Dugger*, 849 F.2d 491 (11th Cir. 1988)) (in turn citing *Huckaby v. State*, 343 So. 2d 29, 33-34 (Fla.), *cert. denied*, 434 U.S. 920, 98 S. Ct. 393, 54 L. Ed.2d 276 (1977)).

We believe the testimony sought to be presented to the jury in the present case, *viz.*, that Sullivan was diagnosed as a paranoid schizophrenic, a disease which continues to affect his judgment and his actions, that he was severely abused as a child, and that his mother and sisters love him and would plead with the jury to spare his life, could, with reasonable probability, have altered the outcome at the penalty phase of the trial. This case is simply not distinguishable from *Busby*, where the murder involved premeditation, luring the victim into the woods, shooting him in the back, stripping the body of a watch and a wallet, and covering the body in an attempt to hide it. We determined there the jury was deprived of information by which it could make the life or death decision in a rational and individualized manner. The jury in this case was deprived of similarly important information through the inaction of defense counsel. Since Sullivan suffered prejudice as a result of his counsel's ineffective assistance, he is entitled to a new sentencing hearing wherein the evidence in mitigation he seeks to introduce, and presumably rebuttal testimony by the state, is heard by the jury.

XIII.

For the foregoing reasons, we affirm the defendant's conviction of first degree murder. We vacate the sentence of death and remand to the trial court for a new sentencing hearing.

CONVICTION AFFIRMED, SENTENCE VACATED. REMANDED FOR NEW SENTENCING HEARING.

CALOGERO, C.J., concurs in the result.

DENNIS, J., dissents with reasons.

MARCUS, J., dissents in part and concurs in part and assigns reasons.

MARCUS, Justice (dissenting in part and concurring in part).

Under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed.2d 674 (1984), the test for ineffective assistance at the penalty phase is whether there is a "reasonable probability" that absent the errors, the sentencer would have concluded that the balance of aggravating and mitigating circumstances did not warrant death. In the present case, the jury was made aware that defendant had been previously diagnosed as a schizophrenic. Given the circumstances of this case, I do not believe that additional evidence on this issue would have had a reasonable probability of changing the jury's recommendation. Accordingly, I respectfully dissent from the majority's opinion insofar as it vacates defendant's death sentence and remands for a new sentencing hearing, but concur with the majority opinion insofar as it affirms defendant's conviction of first degree murder.

DENNIS, Justice dissenting.

I respectfully dissent from the portion of the opinion affirming the conviction.

This case presents again the question of whether the harmless error standard of *Chapman v. California*, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed.2d 705 (1967) applies to a jury instruction that violates the Fourteenth Amendment and the principle of *In re Winship*, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed.2d 368 (1970), because it fails to clearly and

effectively inform each reasonable juror that the state must prove every element of the criminal offense with which the defendant is charged beyond a reasonable doubt.

The United States Supreme Court has not resolved this question in a square holding, but it has given clear signals that such an error cannot be harmless. See discussion in *State v. Cage*, 583 So. 2d 1125, 1130-36 (La. 1991) (Dennis, J., dissenting) and authorities cited therein.

Moreover, the majority failed to properly apply the harmless error standard in the present case. The majority does not seriously attempt to apply the actual holding of Chapman but instead lapses into what is actually nothing more than a *Jackson v. Virginia* sufficiency of evidence review. *Id.* at 1136-37.

Finally, the majority has again defaulted completely in its duty to address the question of whether a reasonable doubt instructional error can be harmless under our state constitution and laws. *Id.* at 1137-38.

In fact, the decision of the United States Supreme Court in *Cage v. Louisiana*, 498 U.S. ___, 111 S. Ct. 328, 112 L. Ed.2d 339 (1990), and this court's derelictions of duty in implementing it have now produced a sad state of affairs. Although this court at one time consistently reversed convictions based on the type of incorrect reasonable doubt instruction given to the jury in this case, see *State v. Vessell*, 450 So. 2d 938 (La. 1984); *State v. McDaniel*, 410 So. 2d 754 (La. 1982); *State v. Mack*, 403 So. 2d 8 (La. 1981); *State v. Moffett*, 127 La. 760, 53 So. 982 (1911); *State v. Ardoin*, 49 La. Ann. 1145, 22 So. 620 (1897), and although the United States Supreme Court has since

declared such an instruction unconstitutional, *Cage v. Louisiana*, 498 U.S. ___, 111 S. Ct. 328, 112 L. Ed.2d 339 (1990), it is now becoming clear that this court will always declare such an error to be harmless, so that, as a matter of fact, *all* trial judges in Louisiana are now free to give the same incorrect instruction on proof beyond a reasonable doubt that only a *few* of them mistakenly or obstinately have given in the past. The criminal justice system in Louisiana would have been more just had the U.S. Supreme Court never decided *Cage v. Louisiana*.

For these reasons, I would reverse the conviction and remand the proceedings for a new trial in accordance with the above.

SUPREME COURT OF LOUISIANA

FROM: Clerk of Supreme Court of Louisiana

On the 9th day of April, 1992, the following action was taken by the Supreme Court of Louisiana in the case(s) listed below:

REHEARING DENIED:

87-KA-0027 STATE OF LOUISIANA V. JOHN L. SULLIVAN (Parish of Orleans)
(Two Applications)
MARCUS, J. - would grant rehearing of State.
DENNIS, J. - would grant rehearing of defendant.

Supreme Court of the United States

No. 92-5129

John Sullivan,

Petitioner

v.

Louisiana

ON PETITION FOR WRIT OF CERTIORARI to the Supreme Court of Louisiana.

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

October 19, 1992

Supreme Court, U.S.
FILED
DEC 8 1992
OFFICE OF THE CLERK

No. 92-5129

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1992

JOHN L. SULLIVAN,

Petitioner,

vs.

STATE OF LOUISIANA,

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF LOUISIANA

PETITIONER'S BRIEF ON THE MERITS

John Wilson Reed
GLASS & REED
338 Lafayette Street
New Orleans, LA 70130
Telephone: (504) 581-9065

William J. Keppel
Counsel of Record
Michael J. Wahoske
Christopher J. Riley
Tamara J. Byram
Karen A. Fairbairn
DORSEY & WHITNEY
220 South Sixth Street
Minneapolis, MN 55402
Telephone: (612) 340-2600

Attorneys for Petitioner

1992 - Dorsey & Whitney, 220 South Sixth Street, Minneapolis, MN 55402 - (612) 340-8863

QUESTION PRESENTED

Whether a constitutionally deficient reasonable doubt instruction can be found harmless error?

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In The
SUPREME COURT OF THE UNITED STATES
October Term, 1992

No. 92-5129

JOHN L. SULLIVAN,
Petitioner,
vs.
STATE OF LOUISIANA,
Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF LOUISIANA

PETITIONER'S BRIEF ON THE MERITS

OPINIONS BELOW

The Louisiana Supreme Court opinion, holding that the instruction given the jury on reasonable doubt was constitutionally deficient under *Cage v. Louisiana*, 111 S. Ct. 328 (1990) (per curiam), but that this error was harmless, is reported at 596 So. 2d 177 (La. 1992). (J.A. 11). The Louisiana Supreme Court denied both petitioner's and the state's separate requests for rehearing. (J.A. 48).

STATEMENT OF JURISDICTION

The opinion and judgment of the Louisiana Supreme Court was entered on March 2, 1992. The Louisiana

Supreme Court denied the state's and petitioner's separate petitions for rehearing on April 9, 1992. Petitioner sought a writ of certiorari on July 8, 1992. This Court granted the petition on October 19, 1992. (J.A. 49). The jurisdiction of this Court is invoked under 28 U.S.C. § 1257 (1988).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Sixth Amendment to the Constitution of the United States provides, in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . .

The Fourteenth Amendment to the Constitution of the United States provides, in pertinent part:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Louisiana Revised Statute section 14:30 reads today, in pertinent part, as it did at the time of petitioner's trial:

> A. First degree murder is the killing of a human being:
>
> (1) When the offender has specific intent to kill or to inflict great bodily harm and is engaged in the perpetration or attempted perpetration of . . . armed robbery . . . .

La. Rev. Stat. Ann. § 14:30 (West 1979).

STATEMENT OF THE CASE

The question before the Court is whether a constitutionally deficient reasonable doubt instruction can be harmless error. Because petitioner relied on his constitutional right to have a jury determine issues of fact and guilt, the error here cannot be found harmless.

A. Course of Proceedings and Disposition Below

Petitioner John L. Sullivan was convicted of first degree murder and sentenced to death. On direct appeal, the Supreme Court of Louisiana found that the reasonable doubt instruction given, although erroneous under *Cage v. Louisiana*, 111 S. Ct. 328 (1990) (per curiam), was harmless error and affirmed the conviction. (J.A. 26-28). The court further held that petitioner was denied effective assistance of counsel at the penalty phase of the trial, vacated the death sentence, and remanded for a new sentencing hearing.1/

B. The Trial Facts

On April 14, 1980 at about 4:00 A.M., a New Orleans bar, the C-Note Lounge, was robbed by two men. A patron of the barroom, Joe King, was killed by a shot from a weapon held by one of those men. (Tr. 192-93). The two robbers had entered the dimly lit bar a short time earlier and had ordered beers from the barmaid. (Tr. 313, 318-19). One of them had shot a game of pool with King. (Tr. 282). When the game was over, the two men met at the bar.

1/ At the remanded sentencing proceeding, the only two choices available to the jury, and to the court, will be life imprisonment without parole or the death penalty. La. Code Crim. Proc. Ann. arts. 905.6 & 905.8 (West 1976).

(Tr. 283, 285). One pulled out a sawed-off shotgun and pointed it at King. (Tr. 366). A single shot discharged at close range killed King. (Tr. 366). Together, the two men at gunpoint then robbed another patron, Mark Legorretta, of a gold wristwatch, (Tr. 367-68), and the barmaid, Stephanie Lowery, of the contents of the cash register, about $150. (Tr. 290-91). The robbers then fled.

At about noon that same day, the police arrested Michael Hillhouse inside a barroom about a mile from the C-Note and at the same time arrested John Sullivan outside that barroom. (Tr. 222-23). Hillhouse, with $53 in his pockets, was wearing a blue pinstriped vest, a plaid shirt, and light-colored pants. (Tr. 236-37). The latter two articles of clothing were later identified by the barmaid Lowery as those worn by one of the robbers. (Tr. 294). Sullivan, with $86 in his pockets, was wearing a gold wristwatch, blue jeans and a maroon shirt. (Tr. 226, 228, 237). The blue jeans and the shirt were never said to be connected to the killing.

Hillhouse was immediately interrogated by the police. While in custody Hillhouse suffered injuries sufficiently serious that by sometime between three and five o'clock that afternoon he was transferred to a hospital for medical treatment. (Tr. 419, 470). An inmate, who saw Hillhouse at the line-up two weeks later, testified at trial that Hillhouse displayed injuries including a cut on the side of his eye, a cut on his chin, and bruises on his hands, his shins, and on the back of his sides. (Tr. 455-60). The witness recounted that Hillhouse, when asked what had happened, said, "The police beat me . . . [t]o make me talk. They just kept beating me trying to make me talk." (Tr. 459). A second inmate testified that in February 1981 he overheard Hillhouse, when asked by Sullivan why he had said what he did, answer "because they kept beating me." (Tr. 447-48). When that witness suggested to Hillhouse that he say something about it, Hillhouse

responded that he couldn't, "because they will beat me again." (Tr. 448).

In his interrogation by the police, Hillhouse confessed involvement in the robbery and killing, but disavowed all responsibility for the killing itself. That, he told the police, was committed by his companion, a person he called "Bub," but whom he later identified as the other man arrested, John Sullivan. (Tr. 436). Pursuant to his statement, Hillhouse directed the police to a nearby apartment. The police conducted a search and recovered a blue pinstriped jacket that Hillhouse said was worn by Sullivan during the robbery but that matched the vest worn by Hillhouse at his arrest, (Tr. 262, 266); a sawed-off shotgun later ballistically identified as the murder weapon, (Tr. 260-61); and a black flight bag from which Hillhouse said Sullivan had originally produced the weapon, (Tr. 263). Hillhouse also directed the police to a car he said was Sullivan's and had been used in the robbery. (Tr. 225). No evidence, however, from or concerning the car or its ownership was introduced at trial.

Although Hillhouse was a previously convicted felon, (Tr. 383), and although by his own statement he was concededly a principal to armed robbery and second degree murder, (Tr. 548-49), the state agreed to give him immunity from any prosecution, not only for the killing, but also for the robbery. He was, nevertheless, kept in custody, first as an accessory and then as a material witness, with the prosecution's guarantee that once the trial was over he would go free. (Tr. 419).

Clothed with total immunity, Hillhouse fully incriminated Sullivan at trial. Claiming to have met his accomplice only five or six hours earlier at another bar, the Polka Dot Lounge, (Tr. 384-85), Hillhouse testified that it was his accomplice's idea: the accomplice had asked Hillhouse if he would like to make quick money. (Tr. 389). He testified it was his accomplice's weapon: the

accomplice had taken it from a black bag handed to him by the bartender at that bar. (Tr. 389). He also testified that it was his accomplice's deed. According to Hillhouse, it was he, Hillhouse, who had shot pool with King, (Tr. 362), but it was the accomplice who had pulled out the shotgun, shot King in the chest, reloaded the gun, and taken the gold watch from Legorretta and the cash from Lowery. (Tr. 366, 395). The accomplice, said Hillhouse, was John Sullivan. (Tr. 366).

Hillhouse acknowledged that during the robbery he had worn the same light-colored pants and plaid shirt in which he was arrested. (Tr. 374-75). He stated that the accomplice had been wearing a blue pinstriped suit, consisting of a matching jacket and pants -- not the clothes John Sullivan was wearing upon arrest. (Tr. 237, 373). Hillhouse's explanation was that after the robbery, he and the man he had identified as Sullivan had first gone back to the Polka Dot and then to a nearby restaurant where, he said, Sullivan had left him for thirty minutes. (Tr. 403). When Sullivan returned, said Hillhouse, he was wearing different clothes. (Tr. 404). Hillhouse said that Sullivan then took him to an apartment where Hillhouse claimed he again saw the shotgun, the black bag, and also a pin-striped vest matching the suit Hillhouse said Sullivan wore in the robbery, which vest Hillhouse then borrowed and was wearing at the time of arrest. (Tr. 375-76, 407).

In this apartment, the police, acting on Hillhouse's information, found the shotgun, the black bag, and the blue pinstriped jacket, but not any blue pinstriped pants. (Tr. 260, 262). Hillhouse claimed that the apartment where this evidence was found had been described by Sullivan as his "wife's." (Tr. 372). Hillhouse identified the gold watch worn by Sullivan at his arrest as "looking like" the watch that was taken.[2/] (Tr. 395-96). Recalled as a rebuttal witness to explain his post-arrest injuries,

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2/ Legorretta, the patron of the bar, did not testify.

Hillhouse admitted a cut chin, but denied being beaten by the police or telling anyone that he had been, claiming rather that he had suffered an epileptic seizure. (Tr. 471).

Of the six witnesses in the bar at the time of the robbery, the state called only one -- the barmaid Stephanie Lowery. Within days of the killing, Lowery had attended a formal physical line-up of eight persons, including both Sullivan and Hillhouse. (Tr. 296-98). She identified neither. (Tr. 297). In fact, as she conceded on cross-examination, she made identifications in her mind of two persons other than Hillhouse and Sullivan. (Tr. 342-43). It was not until another week passed, when she was summoned into the privacy of the district attorney's office, and where, after reviewing for fifteen minutes a black and white photograph of the line-up, that she made an identification of Sullivan. (Tr. 298, 341).

Lowery testified that she had seen neither the shooting itself nor the taking of the watch. (Tr. 327). At trial she identified Sullivan, however, as the person she saw holding the shotgun to Legorretta's head after she got up from behind the bar, where she had ducked when she heard the shot. (Tr. 288-89). Uncertain of the pattern or material of the killer's "blue jacket and blue pants," (Tr. 292, 325), she could identify the blue jacket found at the apartment only as being "something similar" to the one worn by the killer. (Tr. 325).

There was no scientific or forensic evidence connecting John Sullivan either with the offense generally or with the shooting specifically. Although police had removed the perpetrators' beer cans from the bar, no fingerprints were introduced into evidence. Similarly, the state introduced no fingerprints from the recovered weapon or from the car that Hillhouse said was used. Although the shotgun was shown to be the murder weapon, no scientific evidence suggested that Sullivan fired it.

C. The Jury Argument

John Sullivan did not testify. The defense argued Sullivan's innocence to the jury by emphasizing reasonable doubt. (Tr. 513-14). There was reasonable doubt about the testimony of Hillhouse, a convicted felon, whose incrimination of Sullivan to the police, by his own statements to fellow inmates, came only after the duress of a police beating, and whose trial testimony against Sullivan came only after a grant of immunity and the promise of freedom. (Tr. 526-28). There was reasonable doubt about the circumstantial evidence that was linked more to Hillhouse than to Sullivan, and to Sullivan principally on the testimony of Hillhouse. (Tr. 508, 515-21). There was reasonable doubt about the testimony of Lowery, who at the earliest opportunity to make an identification had not only failed to identify Sullivan but identified someone else. (Tr. 504). There was reasonable doubt about the intent of the shooter -- was there an unknown provocation, a reason, an accidental discharge? (Tr. 500). There was reasonable doubt about the lack of evidence: the five witnesses not called (Tr. 510); the scientific evidence not even attempted; the missing pair of pants and perhaps the person wearing them. (Tr. 520). There was reasonable doubt, said the defense, whether John Sullivan was the real accomplice of Hillhouse.

D. The Jury Instructions

The jury was instructed that it was to acquit only if it had an "actual or substantial doubt," only if it had a "grave uncertainty." (J.A. 2). The jury was to be guided in that assessment by "moral certainty." (J.A. 2).3/ The jury instruction was in almost exact terms the jury instruction

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3/ In contrast to evidentiary certainty. *See Cage v. Louisiana*, 111 S. Ct. at 330.

condemned by this Court in *Cage v. Louisiana*, 111 S. Ct. 328 (1990) (per curiam). The exact instruction was as follows:

> If you entertain any reasonable doubt as to any fact or element necessary to constitute the defendant's guilt, it is your sworn duty to give him the benefit of that doubt and return a verdict of acquittal. Even where the evidence demonstrates a probability of guilt, yet if it does not establish it beyond a reasonable doubt, you must acquit the accused. This doubt must be a reasonable one; that is, one founded upon a real, tangible, substantial basis, and not upon mere caprice, fancy or conjecture. It must be such a doubt as would give rise to a grave uncertainty, raised in your minds by reason of the unsatisfactory character of the evidence; one that would make you feel that you had not an abiding conviction to a moral certainty of the defendant's guilt. If, after giving a fair and impartial consideration to all of the facts in the case, you find the evidence unsatisfactory upon any singel [sic] point indispensably necessary to constitute the defendant's guilt, this would give rise to such a reasonable doubt as would justify you in rendering a verdict of not guilty.
>
> A reasonable doubt is not a mere possible doubt. It should be an actual or substantial doubt. It is such a doubt as a reasonable person would seriously entertain. It is a serious doubt, for which you could give good reason.

(J.A. 2-3). On that instruction, the jury returned a verdict of guilty as charged of first degree murder. (J.A. 1). The following day, it returned a sentence of death. (J.A. 1)..

E. The Appeal to the Louisiana Supreme Court

On petitioner's appeal, the Louisiana Supreme Court had before it not only this Court's opinion in *Cage*, holding a virtually identical instruction constitutionally erroneous, but also its own decision on the remand of *Cage* holding that error to be a mere "trial error" subject to harmless error analysis under *Arizona v. Fulminante*, 111 S. Ct. 1246 (1991). *Louisiana v. Cage*, 583 So. 2d 1125 (La.), *cert. denied*, 112 S. Ct. 211 (1991). In applying the harmless error rule on the *Cage* remand, the Louisiana Supreme Court had considered the "entire record." *Id.* at 1128-29. It had twice relied on the language of *Rose v. Clark*, 478 U.S. 570, 579 (1986): "Where a reviewing court can find that the record developed at trial establishes guilt beyond a reasonable doubt, the interest in fairness has been satisfied and the judgment should be affirmed." 583 So. 2d at 1128.4/ It had reached its own conclusion on remand that, in Cage's case, there was "no significant evidence which would have caused reasonable doubt." *Id.* Two justices dissented, believing the harmless error rule was inapplicable. *Id.* at 1130-36 (Calogero, C.J., & Dennis, J. dissenting).

On this appeal, the Louisiana Supreme Court followed its previous decision in *Cage*. It held the jury instruction erroneous but subject to harmless error consideration. It applied a harmless error rule in the same "whole record" way that it had in *Cage* and concluded the error here was

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4/ This Court has since indicated that this language suggests an inappropriate standard of review for cases involving presumptions. *Yates v. Evatt*, 111 S. Ct. 1884, 1892 n.8 (1991); *Carella v. California*, 491 U.S. 263, 267 (1989) (concurring opinion).

harmless. Conceding that Lowery's testimony might be entitled to no weight, it nevertheless deemed that the "unrefuted" testimony of Hillhouse was sufficiently "corroborate[d]" by the evidence at the apartment that it could say that "[t]he evidentiary record clearly *supports* a finding that the erroneous instruction was harmless beyond a reasonable doubt." *Louisiana v. Sullivan*, 596 So. 2d 177, 186 (La. 1992) (emphasis added). (J.A. 28).

SUMMARY OF ARGUMENT

The accused's right to have a jury, not a court, decide guilt or innocence by the standard of proof beyond a reasonable doubt sharply limits the availability of harmless error review of an erroneous reasonable doubt instruction. Where, as here, factual guilt is contested, any harmless error analysis would require judicial fact-finding and thereby violate the right to trial by jury. The opinion of the Louisiana Supreme Court represents precisely such impermissible judicial fact-finding.

The right to trial by jury is the right to have the government's evidence and the truth of its accusations tested and weighed by ordinary citizens, not by judges or other appointees of the government. The right is ultimately the single most powerful bulwark placed by the founding fathers between the powers of the government and the freedom of the individual. *Duncan v. Louisiana*, 391 U.S. 145 (1968). Its denial can never be harmless. The corollary of the right is that judicial fact-finding that substitutes for jury fact-finding violates the right to trial by jury.

The fundamental measure by which juries find facts and determine the "truth" of a government accusation is the standard of proof beyond a reasonable doubt. The truth of allegations that would condemn an accused must be found by the fact-finder beyond a reasonable doubt or it is not found at all. A jury verdict returned on a standard

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short of proof beyond a reasonable doubt is a verdict without constitutional significance. *In re Winship*, 397 U.S. 358 (1970).

The right to trial by jury and the standard of proof beyond a reasonable doubt combine in the rule that the task of determining the "truth" of the government's accusation to the requisite certainty is constitutionally reserved to the jury. Those considerations necessarily constrict any possibility of applying harmless error analysis to a flawed reasonable doubt instruction that leaves a jury verdict devoid of any constitutionally cognizable jury fact-finding. This Court has consistently recognized that a jury finding reached beyond a reasonable doubt is so fundamental that its absence cannot be harmless error. Cases from *United Brotherhood of Carpenters v. United States*, 330 U.S. 395 (1947), through *Yates v. Evatt*, 111 S. Ct. 1884 (1991), acknowledge that appellate fact-finding cannot substitute for a failure of the jury to find facts beyond a reasonable doubt without doing violence to the constitutional imperative that guilt can be determined only by a jury.

The reasonable doubt instruction possesses all the qualities that, under the *Fulminante* opinions, excludes it from harmless error review. A reasonable doubt instruction that correctly insures that a jury will convict only on the degree of proof required by due process is an integral part of the structural guarantee of trial by jury. It is the basic protection without which a criminal trial fails at its function of enabling juries to find the truth. The reasonable doubt instruction is the mechanism by which juries function. To allow that function to be supplanted by courts is to destroy the meaning of trial by jury and the right to jury fact-finding.

An erroneous reasonable doubt instruction prevents a jury from fulfilling its truth-finding task in the only way permissible -- by proof beyond a reasonable doubt. It leaves a record empty of any jury findings of

constitutional certainty. There can be no assurance that the jury determined anything to the required certitude. It is quite distinct from an unconstitutional burden-shifting presumption, which may be subject to harmless error review. Though such presumptions affect the jury's truth-finding task, the jury still functions to find predicate facts beyond a reasonable doubt, against which facts the harmlessness of the error can be judged.

Harmless error analysis cannot be conducted where there are no factual findings beyond a reasonable doubt against which to conduct it. In all applications of harmless error analysis, there is a baseline finding to the requisite degree of constitutional certainty. Against that sure finding, the significance of individual rulings can be evaluated. Here, there is no jury finding beyond a reasonable doubt. Any attempt at harmless error analysis involves a court not simply in making assessments about what a jury did and how it did it, but in making its own original factual assessments in place of those never made by the constitutionally guaranteed trier of fact. The error is one that defies harmless error analysis.

If it were possible to conduct harmless error analysis of an erroneous reasonable doubt instruction, it would have to be an analysis wholly unlike the typical form. It could not be one focused on the supposed persuasiveness of the evidentiary record. Only if it could be said that, in the circumstances of the case, the reasonable doubt instruction played no role might the failing be disregarded. Such a situation might arise if a jury determination of guilt were conceded, and yet the trial proceeded for other reasons -- for example, to preserve a question of law. This is not such a case. It was a case fought out on a claim of innocence requiring jury resolution to determine each elemental fact beyond a reasonable doubt. Whatever room may otherwise exist for harmless error analysis, it has no place here.

The opinion of the Louisiana Supreme Court purporting to apply harmless error analysis in fact evaluates evidence and makes raw credibility choices about witnesses. Its analysis is true neither to the requirement that it focus on how the erroneous instruction functioned nor even to the obligation set forth in *Chapman v. California*, 386 U.S. 18 (1967), to place the burden on the state to eliminate any reasonable possibility that the error contributed to the verdict. The court's opinion exemplifies appellate fact-finding in complete contravention of the right to trial by jury.

ARGUMENT

THE ERRONEOUS REASONABLE DOUBT INSTRUCTION ON WHICH THE JURY VERDICT WAS PREMISED CANNOT BE DISMISSED AS HARMLESS ERROR.

A. The Right to Trial by Jury is a Guarantee Assuring that Citizens, Not Judges, Make Determinations of Fact in Criminal Cases.

Since 1789, the Sixth Amendment has established an accused's right to have his guilt or innocence determined by a jury. Applied to the states through the Fourteenth Amendment, this right to "[t]rial by jury in criminal cases is fundamental to the American scheme of justice." *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968). This recognition, and the historical record on which it is based, does not stem merely from a supposition that the informed common sense of jurors is better suited to the ascertainment of truth than the refined and experienced intellect of judges. The right exists, rather, as a protection against governmental oppression. As a barrier to the will of the government, it places the citizenry itself between

the government and the accused. *Id.* at 154-56; *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975).

Fundamentally, the right to trial by jury is the right not to be tried by a representative of the government which brings the charges; it is a right not to be tried by judges beholden to the government that employs them and pays them. As such, it is a fundamental protection against the dangers of governmental power.

It was on those premises that this Court rested its decision in *Duncan*. 391 U.S. at 145. Tracing the history of trial by jury from the Magna Carta to the Constitution, the Court recognized the role of trial by jury as a structural barrier between the government and the accused. The Court quoted Blackstone:

> "Our law has therefore wisely placed this strong and two-fold barrier, of a presentment and a trial by jury, between the liberties of the people and the prerogative of the crown. . . . [T]he founders of the English law have, with excellent forecast, contrived that . . . the truth of every accusation, whether preferred in the shape of indictment, information, or appeal, should afterwards be confirmed by the unanimous suffrage of twelve of his equals and neighbours indifferently chosen and superior to all suspicion."

Id. at 151-52 (quoting 4 W. Blackstone, *Commentaries on the Laws of England* 349-50 (Cooley ed. 1899)).

In its own words, and acknowledging the English and Colonial experience, including the objections of the colonists to "trials before judges dependent upon the crown alone for their salaries," *id.* at 152, the Court wrote of the great purposes served by trial by jury:

> A right to jury trial is granted to criminal defendants in order to prevent oppression by the Government. Those who wrote our constitutions knew from history and experience that it was necessary to protect against unfounded criminal charges brought to eliminate enemies and against judges too responsive to the voice of higher authority. . . . Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge. . . . [T]he jury trial provisions in the Federal and State Constitutions reflect a fundamental decision about the exercise of official power -- a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges. Fear of unchecked power, so typical of our State and Federal Governments in other respects, found expression in the criminal law in this insistence upon community participation in the determination of guilt or innocence.

Id. at 155-56.

The right to trial by jury thus does not simply reflect a judgment about the truth-finding ability of a lay jury. It embodies the fundamental reservation to the people of the power to weigh and to reject the accusations brought by a government against a citizen. It is true that juries find facts well; as the Court observed in *Duncan*, they "do understand the evidence and come to sound conclusions in most of the cases presented to them." *Id.* at 157. But they do more than that. In service to the citizenry, they

protect an accused in ways not necessarily measured in fact-finding terms. "[W]hen juries differ with the result at which the judge would have arrived, it is usually because they are serving some of the very purposes for which they were created and for which they are now employed." *Id.*

Fair and equitable fact-finding processes that substitute for the citizen jury can be imagined. None, however, provides the structural protection afforded by a system that altogether excludes the government, or any of its representatives, from the determination of factual guilt. That is the quality of trial by jury that makes it the central component of "the structure and style of the criminal process -- the supporting framework and the subsidiary procedures." *Id.* at 150 n.14. It is a "structural guarantee." *Carella v. California*, 491 U.S. 263, 268 (1989) (concurring opinion).

Inasmuch as trial by jury is a prohibition against government agents determining guilt, it follows that courts are constitutionally forbidden to take from the jury, and to arrogate to themselves, the power to determine guilt.[5/] No matter how overwhelming and clear cut the evidence may be, a judge can neither enter a verdict of guilty nor direct the jury to enter a verdict of guilty. *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 573 (1977); *United Brotherhood of Carpenters v. United States*, 330 U.S. 395, 408 (1947); *Sparf & Hanson v. United States*, 156 U.S. 51, 105 (1895). "[U]nder our system of justice, juries alone have been entrusted with th[e] responsibility [of determining a defendant's guilt]." *Weiler v. United States*, 323 U.S. 606, 611 (1945). Because only a jury may exercise the power to determine factual guilt, "[a] defendant may assuredly insist upon observance of this guarantee even when the evidence against him is so overwhelming as to establish guilt beyond a reasonable

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[5/] Of course, courts have the power to overrule juries in order to protect innocence. *Jackson v. Virginia*, 443 U.S. 307, 324 (1979).

doubt." *Carella*, 491 U.S. at 268 (concurring opinion). The Constitution reserves that power to the jury.

B. A Denial of the Right to Have a Jury Make the Determination of Guilt or Innocence is a Fundamental Error not Subject to Harmless Error Review.

There are some rights that are so basic to the structure of a fair trial that their denial is always reversible error. Among them is the right to trial by jury -- the right to have a jury and not a court determine guilt. As the Court said in *Rose v. Clark*, "[h]armless error analysis thus presupposes a trial at which the defendant, represented by *counsel*, may present evidence and argument before an impartial *judge* and *jury*." 478 U.S. 570, 578 (1986) (emphasis added). The Court specifically described the first two, counsel and the judge, as "basic protections [without which] a criminal trial cannot reliably serve its function as a vehicle for the determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair." *Id.* at 577-78 (citation omitted). To those the Court added, in even more ringing terms, the right to a jury. Noting those rulings prohibiting judicial arrogation of the jury's authority to decide guilt, it recognized that the jury's authority was absolute. Without a jury determination of guilt, no verdict can stand, no matter the evidence:

> This rule stems from the Sixth Amendment's clear command to afford jury trials in criminal cases. Where that right [to trial by jury] is altogether denied, the State cannot contend that the deprivation was harmless because the evidence established the defendant's guilt; the error in such a case is that the wrong entity judged the defendant guilty.

Id. at 578 (citation omitted).

The opinions in *Arizona v. Fulminante*, 111 S. Ct. 1246 (1991), accept that a denial of the right to trial by jury can never be harmless. The majority opinion is based substantially on the language of *Rose*. Distinguishing between trial error and those errors that affect the "framework within which the trial proceeds," the Court specifically noted counsel and an impartial judge as key elements of the trial mechanism. *Id.* at 1265. Although it did not reference the jury itself, its reliance on the language of *Rose* and its description of "basic protections" implicitly acknowledge the jury as one of the three structural elements of the "framework within which the trial proceeds." *Id.* Even more than counsel who advocates evidence and the judge who admits or excludes it, the jury, which alone determines the weight to be given to that evidence, is the key component of the "trial mechanism." *Id.*

As trial by jury is a "structural guarantee," *Carella*, 491 U.S. at 268 (concurring opinion), so would its denial be a structural defect in the trial mechanism -- one that affects, indeed renders in vain, "[t]he entire conduct of the trial from beginning to end." *Fulminante*, 111 S. Ct. at 1265. Without the only structural element constitutionally empowered to determine guilt, the trial structure is a nullity. The dissenting opinion in *Fulminante* acknowledged that, whatever the analytic framework, the right to have the determination of guilt made by a jury is so fundamental that its denial can never be absolved. *Id.* at 1256 (White, J., dissenting).

Each of the *Rose*, *Carella* and *Fulminante* opinions embodies the awareness that the structural function of trial by jury rests among those "fundamental principles of liberty and justice which lie at the base of all our civil and

political institutions." *Duncan*, 391 U.S. at 148 (quoting *Powell v. Alabama*, 287 U.S. 45, 67 (1932) (itself quoting *Hebert v. Louisiana*, 272 U.S. 312, 316 (1926))). Within our system of justice, there can be no substitute for a jury's determination of guilt.

C. A Jury's Determination of Guilt Must be Made by a Standard of Proof Beyond a Reasonable Doubt.

The right to trial by jury is, of course, not an abstraction, satisfied by the mere presence of six or twelve citizens in the jury box. It is the right to have those citizens serve as fact-finders. In the American system of justice, fact-finding must be done pursuant to the only constitutionally acceptable standard for finding facts in criminal cases, the standard of proof beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 362 (1970). That standard is the constitutionally required "measure of persuasion by which the prosecution must convince *the trier* of all the essential elements of guilt." *Id.* at 361 (emphasis added) (quoting C. McCormick, *Evidence* § 321, at 681-82 (1954)). Like trial by jury, it "reflect[s] a profound judgment about the way in which law should be enforced and justice administered." *Id.* at 361-62 (quoting *Duncan*, 391 U.S. at 155). It "provides 'concrete substance' for the presumption of innocence -- that bedrock, 'axiomatic and elementary' principle whose 'enforcement lies at the foundation of the administration of criminal law.'" *Id.* at 363 (quoting *Coffin v. United States*, 156 U.S. 432, 453 (1895)). Just as it "is the duty of the government to establish . . . guilt beyond a reasonable doubt," *id.* at 362 (quoting *Leland v. Oregon*, 343 U.S. 790, 802-03 (1952) (Frankfurter, J., dissenting)), it is only the jury of citizens, interposed between that government and the accused, that can make the determination whether the government has fulfilled that burden.

The requirement of proof beyond a reasonable doubt is both an acknowledgment that "[t]here is always in litigation a margin of error," and a determination that where life and liberty are at stake, the risks of error must be cast in a way that protects the "transcending value" that an accused has in his liberty. *Id.* at 364 (quoting *Speiser v. Randall*, 357 U.S. 513, 525-26 (1958)). Since in a contested case it is impossible to "acquire unassailably accurate knowledge of what happened[,] [i]nstead all the fact-finder can acquire is a belief of what probably happened." *Id.* at 368, 370 (Harlan, J., concurring). Although the "intensity of this belief," *id.*, is not susceptible of exact measurement, the reasonable doubt formulation emphasizes the necessary "stringent standard for criminal trials." *Id.* at 372. It assures that "the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned." *Id.* at 364 (opinion of the Court). It guarantees that the individual will not be condemned by the government except on evidence that "convince[s] a proper factfinder of his guilt with utmost certainty." *Id.* At bottom, the requirement of proof beyond a reasonable doubt reflects "a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free." *Id.* at 373 (Harlan, J., concurring).

Anything less than a standard of proof beyond a reasonable doubt both increases the unacceptable risk that the innocent will be wrongly convicted, *see Ivan V. v. City of New York*, 407 U.S. 203, 205 (1972) (per curiam), and decreases society's confidence in the reliability and certainty of the judgments that condemn its members to loss of liberty or loss of life. *See Winship*, 397 U.S. at 364 ("[U]se of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law."). Whether the instructional failure be the absence of any reasonable doubt instruction at all, a preponderance

standard as in *Winship*, or, as here, an erroneous reasonable doubt instruction that "allow[s] a finding of guilt based on a degree of proof below that required by the Due Process Clause," *Cage v. Louisiana*, 111 S. Ct. at 330, the result is the same.6/ The fact-finder has not been instructed on the proper standard of proof and there is consequently no assurance that the facts were found to the constitutionally required level of certainty.

The instruction used here and in *Cage* may require a higher degree of jury certainty than the mere preponderance standard, but a verdict based upon it nevertheless lacks the assurance that the reasonable doubt standard embodies and that the Constitution compels. Such a verdict is entitled to no greater respect than one obtained with no standard whatever, for guilt, though it may not be ascertainable with mathematical precision, is nevertheless an absolute within our system of justice. Citizens are not a little bit guilty, mostly guilty, or substantially guilty. They are either guilty beyond a reasonable doubt, or they are not guilty at all.

The language of *Winship* confirms that where the right to trial by jury obtains, that right is not fulfilled unless the *jurors* are convinced of guilt beyond a reasonable doubt. The fact-finder to whom an accused is entitled is a jury of his or her peers, and if the right to such a fact-finder is meaningful, it is this fact-finder, and none other, who must make the factual findings of guilt beyond a reasonable doubt. Thus, the Court in *Winship* quoted from *Davis v. United States*, 160 U.S. 469, 493 (1895):

> No man should be deprived of his life under the forms of law unless *the jurors* who try him are able, upon *their* consciences, to say that the evidence before them . . . is sufficient to show beyond a reasonable doubt the existence of every fact necessary to constitute the crime charged.

397 U.S. at 363 (emphasis added). Repeatedly, this Court referred in *Winship* to the obligation to convince the "fact-finder" of guilt beyond a reasonable doubt.7/ The fact-finder who must be convinced is the trial jury.

As it is the defendant's right to have a jury make the determination of guilt or innocence, it is necessarily the defendant's right to have the jury make that determination according to the standard of proof beyond a reasonable doubt. As this Court said in *Bollenbach v. United States*:

> In view of the place of importance that trial by jury has in our Bill of Rights, it is not to be supposed that Congress intended to substitute the belief of appellate judges in the guilt of an accused, however justifiably engendered by the dead record, for ascertainment of guilt by a jury under

6/ Indeed, the omission of any instruction altogether may often be less prejudicial than a misstatement of the law. *See Henderson v. Kibbe*, 431 U.S. 145, 155 (1977).

7/ "'[T]he prosecution must *convince the trier* of all the essential elements of guilt.'" *Winship*, 397 U.S. at 361 (emphasis added) (quoting C. McCormick, *Evidence* § 321, at 681-82 (1954)). "'[T]his margin of error is reduced . . . by the process of placing on the other party the burden of . . . *persuading the fact-finder* at the conclusion of the trial of his guilt beyond a reasonable doubt.'" *Id.* at 364 (emphasis added) (quoting *Speiser*, 357 U.S. at 525-26). "[N]o man shall lose his liberty unless the government has borne the burden of . . . *convincing the factfinder* of his guilt." *Id.* (emphasis added) (quoting *Speiser*, 357 U.S. at 526). Every citizen must have confidence that he or she cannot be judged guilty of a criminal offense "without *convincing a proper factfinder* of his guilt with utmost certainty." *Id.* (emphasis added); *see also id.* at 369-73 (Harlan, J., concurring).

> appropriate judicial guidance, however cumbersome that process may be.

326 U.S. 607, 615 (1946). Under *Winship* and *Davis*, the irreducible minimum of the appropriate judicial guidance to which *Bollenbach* refers is an instruction that correctly permits the jury to convict only if it finds the facts to have been established by proof beyond a reasonable doubt, not by some other standard that allows guilt to be determined on a lesser degree of proof. Without a proper instruction, there has been no jury finding that fulfills the constitutional purpose of a jury.

D. An Instruction that Allows a Jury to Find Facts at a Level of Certainty Lower than that Required by Due Process Falls Among those Fundamental Errors Not Appropriate for Harmless Error Analysis.

The right to have a citizen jury and not a court make factual determinations of guilt, the requirement that the citizen jury make those factual determinations only when persuaded to the certainty required by the reasonable doubt standard, and the absence here of *any* jury findings actually made beyond a reasonable doubt -- all lead to the conclusion that no harmless error analysis can be performed here that is faithful to constitutional principles.

1. The error which occurred here has long been regarded by this Court as too fundamental to allow harmless error review.

It has long been the understanding of this Court that a jury verdict returned without a proper instruction on reasonable doubt cannot stand, that an instructional error which altogether vitiates the jury verdict is too fundamental to be subject to the harmless error rules. Beyond the language of *Bollenbach*, 326 U.S. at 615, noted above, is an even more imperative statement in *United Brotherhood of Carpenters*, 330 U.S. at 410 (footnote omitted), where this Court observed:

> No matter how clear the evidence, [a defendant is] entitled to have the jury instructed in accordance with the standards which Congress has prescribed. To repeat, guilt is determined by the jury, not the court. . . . [W]here the evidence against an accused charged with a crime is well-nigh conclusive and the court fails to give the reasonable-doubt instruction . . . [i]t could not be said that the failure was harmless error.

More recently in *Jackson v. Virginia*, 443 U.S. 307 (1979), in holding that a court could review the evidentiary sufficiency of a jury finding of guilt beyond a reasonable doubt, the Court emphasized that a properly instructed jury finding is a *sine qua non:*

> Our cases have indicated that failure to instruct a jury on the necessity of proof of guilt beyond a reasonable doubt *can never be harmless error.* Thus, a defendant whose

> guilt was actually proved by overwhelming evidence would be denied due process if the jury was instructed that he could be found guilty on a mere preponderance of the evidence.

Id. at 320 n.14 (emphasis added) (citations omitted).

The language of *Martin Linen Supply*, 430 U.S. at 564, leads to the same conclusion. There the Court restated the structural purpose of a jury: "to stand between the accused and a potentially arbitrary or abusive Government that is in command of the criminal sanction." *Id.* at 572. "For this reason," said the Court, "a trial judge is prohibited from entering a judgment of conviction or directing the jury to come forward with such a verdict, regardless of how overwhelmingly the evidence may point in that direction." *Id.* at 572-73 (citations omitted). Although an instruction to convict on less than proof beyond a reasonable doubt does not itself "direct" a verdict, it has an equivalent effect. It directs a jury, indeed misdirects a jury, to return a judgment of conviction without a finding of guilt beyond a reasonable doubt. Conversely, the application of harmless error becomes the precise equivalent of a trial court entering a judgment of conviction. The defective verdict is replaced by a court's assessment of the evidence, and the constitutional role of the jury is supplanted by the judiciary. *Martin Linen* thus indicates that a jury verdict returned with the constitutional level of certainty is not only fundamental, but so much so that there can be no judicial substitute.

2. The error involves rights that are both structural and fundamental.

The assumption of the foregoing cases is reaffirmed by the Court's analyses of harmless error review in

Fulminante. **Viewing the issue within the structural framework described by the *Fulminante* majority, or examining it in terms of the basic values and rights emphasized by the *Fulminante* minority, the conclusion is the same -- an erroneous reasonable doubt instruction strikes at the heart of the criminal trial.**

The majority opinion in *Fulminante* distinguished between trial errors occurring during the presentation of a case to a jury and capable of quantitative harmless error assessment, and structural defects inhering in the trial mechanism itself and defying analysis by harmless error standards. 111 S. Ct. at 1264-65. The instant error falls into the latter category. Structural errors are those which render a criminal trial fundamentally unfair because it cannot "reliably" serve its function as a "vehicle" for the "determination" of guilt. *Id.* at 1265. A jury, of course, is *the* constitutional "vehicle" for determining guilt, and reasonable doubt is *the* constitutional standard by which that "determination" is made to the degree of "reliability" commanded by the Constitution. A trial that proceeds without a jury properly instructed on reasonable doubt fails at its basic function.

The structural elements of a fair trial explicitly identified in *Fulminante* -- counsel and the court -- are distinctly ancillary to the third element, the jury's determination of guilt beyond a reasonable doubt. *Fulminante* recognizes that the trial mechanism requires not simply that there be a counsel and that there be a court, but that each be able to fulfill its constitutionally assigned function in service to the jury and the decisional process by which guilt is reliably determined. Thus, the right to a fair trial is structurally denied not only when counsel is altogether absent, *Gideon v. Wainwright*, 372 U.S. 335 (1963), or functionally so, *Powell v. Alabama*, 287 U.S. 45 (1932), but also when an actual conflict of interest adversely affects counsel's performance. *Compare Holloway v. Arkansas*, 435 U.S. 475 (1978) *with Cuyler v.*

Sullivan, 446 U.S. 335 (1980). The denial of counsel "acting in the role of an advocate," *Anders v. California*, 386 U.S. 738 (1967), is not prejudicial simply for its betrayal of the client's interests, but for the harm it does to the truth-seeking function of the trial process and to the ability of the jury to reach a just and reliable conclusion.8/ The absence of an advocate who serves the fact-finding tribunal is thus a structural defect that renders the determination of guilt inherently unfair. It is a structural defect that resists harmless error analysis. *Rose v. Clark*, 478 U.S. at 577-78, *cited in Fulminante*, 111 S. Ct. at 1265.

The second structural element identified in *Fulminante* may be similarly viewed. It is not simply "a judge" who is a fundamental element of the trial mechanism, but rather a judge presumptively capable of impartially controlling the proceedings and the flow of evidence. *Tumey v. Ohio*, 273 U.S. 510, 532, 535 (1927). Again, the ultimate end served by the judge is the integrity and reliability of the jury fact-finding that rests on that evidence. Without the assurance of a fair judge, the determination of guilt cannot be regarded as "fundamentally fair." *Fulminante*, 111 S. Ct. at 1265

8/ Ethical Consideration 7-19 of the Model Code of Professional Responsibility explains that a lawyer's obligation is as much to the court and the jury as to the defendant:

> An adversary presentation counters the natural human tendency to judge too swiftly in terms of the familiar that which is not yet fully known; the advocate, by his zealous preparation and presentation of facts and law, *enables the tribunal* to come to the hearing with an open and neutral mind and to render impartial judgments. The duty of a lawyer to his client and his duty to the legal system are the same: to represent his client zealously within the bounds of the law.

Model Code of Professional Responsibility EC 7-19 (1980) (emphasis added) (footnotes omitted).

(quoting *Rose*, 478 U.S. at 577). There is again a structural defect incapable of *post hoc* appellate remedy. *Id.*

A reasonable doubt instruction is as critical to the functioning of the third element of the trial mechanism, the jury, as advocacy is to counsel or impartiality to the court. Without a correct instruction on reasonable doubt, the jury cannot fulfill its constitutionally assigned task of finding facts in the only way that facts can be constitutionally found in a criminal proceeding. Whether the jury receives no instructions whatever; whether the jury is instructed to find facts only by a preponderance, *Davis*, 160 U.S. at 487-88; or whether, as here, the instruction permits the jury to convict on "a degree of proof below that required by the Due Process Clause," *Cage v. Louisiana*, 111 S. Ct. at 330, the failing is the same. A jury that functions pursuant to a standard of proof below that required by due process is a jury that constitutionally might as well not be there at all. The defect is a structural one. The resulting verdict is one that does not "reliably serve its function as a vehicle for determination of guilt or innocence." *Fulminante*, 111 S. Ct. at 1265 (quoting *Rose*, 478 U.S. at 577-78).

Determining whether there is a reasonable doubt as to guilt is the very *raison d'etre* of the trial mechanism. As *Fulminante* says, "the central purpose of a criminal trial is to decide the defendant's factual guilt or innocence." *Id.* at 1264. That central purpose can be achieved only by a jury instructed to determine the truth by proof beyond a reasonable doubt. Any diminution in that standard is an error that "transcends the criminal process," that affects the trial process "from beginning to end," and that deprives a defendant of a "basic protection." *Id.* at 1265. Under that analysis it is a structural defect that cannot be disregarded as harmless. *See id.* at 1264-65.

The minority in *Fulminante* did not adopt the dichotomy between structural errors affecting the trial framework and trial errors susceptible to quantitative

assessment. It emphasized rather "the nature of the right at issue and the effect of an error upon the trial." *Id.* at 1255 (White, J., dissenting). Under this analysis, the minority opinion left no doubt that a defective reasonable doubt instruction was an error too fundamental to be salvaged by harmless error review. Quoting *Jackson v. Virginia*, 443 U.S. at 320 n.14, that a failure to instruct on reasonable doubt could never be harmless, and distinguishing *Kentucky v. Whorton*, 441 U.S. 786 (1979), that a failure to instruct on the presumption of innocence could be, the minority observed:

> While it may be possible to analyze as harmless the omission of a presumption of innocence instruction when the required reasonable doubt instruction has been given, it is impossible to assess the effect on the jury of the omission of the more fundamental instruction on reasonable doubt. In addition, omission of a reasonable doubt instruction, though a "trial error," *distorts the very structure of the trial* because it creates the risk that the jury will convict the defendant even if the State has not met its required burden of proof. *Cf. Cool v. United States*, 409 U.S. 100, 104 (1972); *In re Winship*, 397 U.S. 358, 364 (1970).

Fulminante, 111 S. Ct. at 1255 (White, J., dissenting) (emphasis added).[9] A verdict returned on an instruction that lowers the standard of proof suffers the same vice as

[9] *Cf. Taylor v. Kentucky*, 436 U.S. 478 (1978) (conviction reversed where failure to charge presumption of innocence was accompanied by a suspect reasonable doubt instruction and other factors diluted reasonable doubt).

one returned on none. The risk persists that the defendant was convicted without persuasion of the jury to the requisite degree.

3. The error is distinct from other instructional errors found harmless.

The Court's opinions from *Connecticut v. Johnson*, 460 U.S. 73 (1983), to *Yates v. Evatt*, 111 S. Ct. 1884 (1991), analyzing unconstitutional burden-shifting presumptions for harmless error consistently distinguish a failure to instruct on reasonable doubt as an error not subject to harmless error review. An unconstitutional presumption may "invade the truth-finding task assigned solely to juries," *Carella*, 491 U.S. at 265, but it nevertheless still requires the jury to decide the predicate facts beyond a reasonable doubt and leaves jury fact-findings as a basis for harmless error review. An erroneous reasonable doubt instruction, on the other hand, altogether prevents the jury from performing its constitutional task. There is a complete failure of jury fact finding.

That an erroneous reasonable doubt instruction is different in kind from an erroneous presumption, and as such could not be analyzed as harmless, was first emphasized by the dissent in *Connecticut v. Johnson*, 460 U.S. at 90 (Powell, J., dissenting). Observing that a presumption "does not remove the issue of intent from the jury's consideration," the dissent distinguished a failure to instruct on reasonable doubt, which would "prevent a jury from considering an issue." *Id.* at 95 n.3. The dissent concluded that a "*Sandstrom* [burden-shifting] error[10] . . . is not comparable to an instruction that can never be harmless -- for example, an instruction

[10] *Sandstrom v. Montana*, 442 U.S. 510 (1979).

that fails to inform the jury that it must find guilt beyond a reasonable doubt." *Id.* at 98 n.6.

In *Rose v. Clark*, the Court undertook harmless error analysis only after assuring itself that the jury was "clearly instructed that it had to find [the defendant] guilty beyond a reasonable doubt as to every element." 478 U.S. at 579. It then specifically adopted the distinction of the *Johnson* dissent between an unconstitutional presumption and a failure to instruct on reasonable doubt. Because of the presence of actual jury findings beyond a reasonable doubt, the Court rejected a contention that a presumption had the same effect as a directed verdict proscribed by *Martin Linen*:11/

> Nor is *Sandstrom* error equivalent to a directed verdict for the State. When a jury is instructed to presume malice from predicate facts, it still must find the existence of those predicate facts beyond a reasonable doubt. In many cases, the predicate facts [thus found] conclusively establish intent . . . . In that event the erroneous presumption is superfluous: the jury has found, in *Winship's* words, "every fact necessary" to establish every element of the offense beyond a reasonable doubt.

Id. at 580-81 (citations omitted). At the same time the Court explicitly distinguished a failure to instruct on reasonable doubt as an error that indeed *prevented* the jury from making findings beyond a reasonable doubt:

> Because a presumption does not remove the issue of intent from the jury's consideration, it is distinguishable from other instructional errors that prevent a jury from considering an issue. *Connecticut v. Johnson*, 460 U.S. at 95 n.3 (Powell, J., dissenting). Cf. *Jackson v. Virginia*, 443 U.S. 307, 320 n.14 (1979) (suggesting that failure to instruct a jury as to the reasonable-doubt standard cannot be harmless).

Id. at 580 n.8. Implicitly, the opinion recognizes that a verdict returned without proper instruction on reasonable doubt suffers the vice of the directed verdict condemned in *Martin Linen*.

The later presumption cases, *Carella* and *Yates*, both focus on the constitutional and analytic necessity of reviewing instructional error in terms of the facts the jury found beyond a reasonable doubt. They are mindful of the constitutional proscription against courts making their own factual findings. *Yates* eschewed inquiry into what a jury *could have* reasonable concluded; the issue is whether "the jury actually rested its verdict," *Yates*, 111 S. Ct. at 1893, on facts found beyond a reasonable doubt. Both relied on the language of *Rose* to analyze the effect of a presumption by reference to the assurance that the jury had at least found the predicate facts beyond a reasonable doubt; *Yates* specifically disavowed broader language from *Rose* that seemed to countenance an appellate sufficiency analysis. *Id.* at 1892 n.8; *see also Carella*, 491 U.S. at 266.

The concurrence in Carella explicitly acknowledged that an accused's structural right to have factual determinations made by a jury, and the prohibition against judges doing so, were controlling factors in the application of harmless error analysis. "These principles

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11/ Whether a presumption had this effect had previously divided the *Johnson* plurality, 460 U.S. at 84, and the *Johnson* dissent, *id.* at 94 (Powell, J., dissenting).

necessarily circumscribe the availability of harmless-error analysis when a jury has been instructed to apply a conclusive presumption." *Carella*, 491 U.S. at 269 (concurring opinion). Positing a conclusive presumption that did not necessarily flow from the predicate facts, the opinion explained:

> [T]he problem would not be cured by an appellate court's determination that the record evidence *unmistakably* established guilt, for that would represent a finding of fact by judges, not by a jury. As with a directed verdict, "the error in such a case is that the wrong entity judged the defendant guilty."

Id. (emphasis added) (quoting *Rose*, 478 U.S. at 578). Later, accepting that the error of a jury verdict returned on a permissive but rebutted presumption might be validated by appellate review of the whole record, the concurrence emphasized that "it is quite another [thing] to say that the jury's failure to make any factual determination of the elemental fact . . . will be similarly disregarded." *Id.* at 273. In every case the touchstone is a jury finding beyond a reasonable doubt, necessarily predicated on a proper reasonable doubt instruction.12/

Between them, *Carella* and *Yates* reaffirm the language of *Bollenbach:* "The question is not whether guilt may be spelt out of a record, but *whether guilt has*

12/ The willingness of the Court in *Pope v. Illinois*, 481 U.S. 497 (1987), to subject a non-presumption instructional error to harmless error review was similarly based on the existence of jury findings beyond a reasonable doubt. Those facts which the jury had found beyond a reasonable doubt, despite a faulty instruction on community standards, were the premise for the application of harmless error review. *See id.* at 503; *see also Carella*, 491 U.S. at 270-71 (concurring opinion).

been found by a jury according to the procedure and standards appropriate for criminal trials . . . ." 326 U.S. at 614 (emphasis added). The distinctive failing of the instructional error here was that neither guilt nor any fact at all was found by a jury with the requisite degree of certainty.

4. The error leaves the record without an objective basis for harmless error review and thus defies such analysis.

As the Court explained in *Fulminante*, some errors simply defy harmless error analysis because the defect pervades or alters the structure of the trial process, making it impossible for the court to determine whether the error was harmless based on the trial record. 111 S. Ct. at 1264-65; *accord id.* at 1254-55 (White, J., dissenting). These "structural errors" result in automatic reversal. The lack of a correct reasonable doubt instruction is such an error because, without this instruction, the record is devoid of any "facts found by the jury," *Pope v. Illinois*, 481 U.S. 497, 503 n.6 (1987), upon which the court can determine the harmlessness of the error. *Fulminante*, 111 S. Ct. at 1255 (White, J., dissenting) ("[I]t is impossible to assess the effect on the jury of the omission of the more fundamental instruction on reasonable doubt.").

In performing harmless error analysis, the court uses the jury's verdict as the reference point in measuring the impact of an error. Since the verdict is, by nature, a showing of the jury's findings as to each element of the offense beyond a reasonable doubt, the court can examine those findings to assess the magnitude of the error. In fact, harmless error analysis has always been conducted only with the assurance that the jury in any event made a finding of guilt based on a proper instruction of proof beyond a reasonable doubt. *See Rose v. Clark*, 478 U.S. at 580 (harmless error applied because jury was required to

find the presumption-triggering facts beyond a reasonable doubt); *see also Jackson*, 443 U.S. at 318 (only after determining whether the jury was instructed properly under *Winship* is the court to review the sufficiency of the evidence).

In cases of improperly admitted evidence, for example, the court examines for harmless error by striking the erroneously-admitted evidence and considering the untainted evidence supporting the required element or finding. *See, e.g., Satterwhite v. Texas*, 486 U.S. 249, 258-59 (1988). Because the jury found that element beyond a reasonable doubt, the court can consider the relative strength of the untainted evidence and the prejudicial impact of the error and can make a satisfactory determination of the effect the error had on the jury. A similar process is followed in reviewing an improper limitation on defense cross-examination of a government witness. *See, e.g., Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986). In every case, the jury's elemental findings beyond a reasonable doubt are the benchmark against which the assessment is made.

As discussed in the preceeding section, a similar, although more narrowly focused, process is followed when the instructions to the jury included an improper burden-shifting presumption. In those cases, harmless error analysis is based on predicate facts, found by a jury beyond a reasonable doubt, which allow the court to determine whether the effect of the improper presumption was harmless. The absence of any such findings defeats the possibility of performing the analysis. Thus, a jury finding beyond a reasonable doubt remains the benchmark for harmless error review.

Since without a proper reasonable doubt instruction the reviewing court has no assurance that the fact-finder has found any elemental fact by the constitutionally required standard, it is impossible for the court in such cases to determine whether the error was harmless.

Harmless error analysis in these situations would involve the court not in "preserv[ing] a jury's findings" but in "supplement[ing] those findings." *Pope*, 481 U.S. at 497, 509 (Stevens, J., dissenting). This is precisely the kind of speculation that the harmless error doctrine does not countenance, and neither does the Constitution. *Id.* A "subjective enquiry into the jurors' minds," *Yates*, 111 S. Ct. at 1893, is inappropriate.

This situation is similar to the errors in *Holloway*, counsel with a conflict of interest, and in *Tumey*, a biased judge, in that each of these structural errors requires reversal because it affects the composition of the record in indeterminable ways. The reviewing court cannot know precisely how the record was affected by the conflicted counsel or what unconflicted counsel would have done differently. *Holloway*, 435 U.S. at 490-91. Likewise, it cannot determine the effects of a biased judge. *Tumey*, 273 U.S. at 532, 535. In such cases, where the error prevents the court from confidently reviewing the impact of the error, harmless error analysis is not appropriate. *See Holloway*, 435 U.S. at 490; *Carella*, 491 U.S. at 270 (concurring opinion).

Here the error does not affect the evidentiary content of the record presented to the jury and preserved for this Court, but it does affect the record in a way that is even more unfathomable. It leaves the reviewing court without any knowledge that the jury was persuaded with constitutional certainty of any element of the offense. The court is left without any sure guide to the jury's evaluation of credibility and conflict. It has only its own constitutionally prohibited speculations about the jury's certitude. It has no reference for harmless error analysis.

5. The error here is not harmless.

As the concurring opinion in *Carella* stated, an error such as occurred here "would not be cured by an appellate court's determination that the record evidence *unmistakably* established guilt, for that would represent a finding of fact by judges, not a jury. As with a directed verdict, 'the error in such a case is that the wrong entity judged the defendant guilty.'" 491 U.S. at 269 (concurring opinion) (emphasis in original) (quoting *Rose*, 478 U.S. at 578). Constitutional error in a reasonable doubt instruction could be harmless "only in those 'rare situations' when 'the reviewing court can be confident that [such an] error did not play any role in the jury's verdict.'" *Id.* at 270 (quoting *Connecticut v. Johnson*, 460 U.S. at 87). In a different articulation, the test is whether there is a "reasonable possibility" that the error "might have contributed to the verdict." *Yates*, 111 S. Ct. at 1892-93 (quoting *Fahy v. Connecticut*, 375 U.S. 85, 86-87 (1963)). Any principled harmless error analysis here would thus have to be "wholly unlike the typical form of such analysis." *Carella*, 491 U.S. at 267 (concurring opinion). The focus must be on the role of the instruction, not on the weight of the evidence. *Id.* at 269; *Yates*, 111 S. Ct. at 1893-94. In a factually contested case, the role of the instruction is central, and any instruction that lowers the state's burden below that required by due process must necessarily have "contributed" to the verdict of jurors presumed to have followed that instruction.

A court's instruction on the burden of proof is in most cases, as it was here, the focal point of the evidentiary presentation, the advocacy of counsel, and the other instructions of the court. When the jury begins weighing fact and credibility to determine guilt, that instruction is the principle that guides its work. As it proceeds to determine the existence of each element, that instruction provides the measure by which it can declare the truth

found and its work done. What the jury concluded when that measure was unconstitutionally placed in the state's favor, to allow guilt on proof less than that required by due process, is known. What the result would be if the measure had been properly cast to require greater certainty is unknown and unknowable. It is certain that the fate of an accused depends on the measure of persuasion required; it is equally certain that the jury must rely on the instruction for that measure. So long as the evidence and its weight are disputed, the instructional error necessarily contributes to the verdict.

It may be possible to conceive of cases where instructional error as to reasonable doubt would be harmless error, but only if the jury were not actually weighing facts to determine guilt. Such a situation might perhaps arise where a jury determination of guilt is conceded, but the trial proceeds for other reasons -- to address sentencing questions, to preserve appellate review on a pre-trial ruling, or to otherwise present a question of law. In such a case, any reasonable doubt instruction given would play no role, and any error therein would be harmless.

In the vast majority of criminal trials, however, the outcome does depend on the jury's performance of its truth-finding function. In many trials the defense exercises its right to offer no evidence and relies solely on the presumption of innocence and the weakness of the prosecution's case. In such a case, the jury must decide whether the prosecution's evidence is sufficiently credible to establish each element of the offense beyond a reasonable doubt. In the present case, where the record reveals contested issues of fact, it is all the more clear that one cannot say the reasonable doubt instruction did not contribute to the jury's decision. Consistently with the principles that guarantee the defendant a jury's determination of guilt beyond a reasonable doubt, one

cannot say the error in this factually contested case was harmless.

E. The Louisiana Supreme Court Opinion on Harmless Error Represents Appellate Fact Finding Constitutionally Proscribed by the Sixth Amendment and Impermissible Under Any Interpretation of *Chapman v. California*.

The Louisiana Supreme Court's attempt at applying a form of harmless error analysis to this case demonstrates the impossibility of a principled and constitutional fact-based analysis where there are no reliable jury findings. It represents precisely the kind of appellate fact-finding that derogates the Sixth Amendment right to trial by jury. Finally, it is faithless to the requirement which underlies even a whole-record *Chapman* analysis -- that the state bear the burden of demonstrating that the error did not contribute to the conviction. *Chapman v. California*, 386 U.S. 18, 24 (1967).

As Justice Dennis argued in his dissent below, the majority of the Louisiana Supreme Court held this error to be harmless without correctly applying even a traditional whole-record *Chapman* harmless error test. (J.A. at 46). Instead of inquiring whether there was a "reasonable possibility" that the error contributed to the conviction, instead of requiring the state to prove beyond a reasonable doubt that it did not, and instead of analyzing the operation of the instruction itself, *Chapman*, 386 U.S. at 24, the court merely engaged in its own weighing of the evidence. The Louisiana Supreme Court's analysis, in its entirety, was as follows:

> [T]he testimony of Hillhouse fingering Sullivan as the leader and triggerman remains unrefuted, even in light of the deal given him in exchange for his testimony.

Whatever the weight given Lowery's identification of Sullivan in the photograph of the line-up and in her identification of Sullivan at trial, other evidence, albeit circumstantial, corroborates Hillhouse's version of the facts. The murder weapon, the flight bag, and the suit jacket worn by Sullivan during the crime were later found at the apartment shared by Sullivan and Wold. It was to this apartment that Sullivan had brought Hillhouse to meet his "wife" the morning of the murder.

The evidentiary record clearly supports a finding that the erroneous instruction was harmless beyond a reasonable doubt. *See Chapman, supra; Gibson, supra.* In light of this evidence, the impact of the erroneous instruction could not have affected the jury's deliberation as to Sullivan's guilt.

(J.A. at 27-28).

The Louisiana Supreme Court thus engaged in something both akin to a sufficiency review under *Jackson*, 443 U.S. at 319, and raw appellate fact-finding. By its language, "[w]hatever the weight given Lowery's identification," (J.A. 27), the court signalled *its* choice not to credit Lowery's testimony. Conversely, by its language, "even in light of the deal given him in exchange for his testimony," (J.A. 27), the court announced *its* choice to believe Hillhouse.

The Louisiana Supreme Court's analysis is wrong on several counts. First, the *Chapman* inquiry necessarily differs from a *Jackson* analysis in the questions it asks and in the burden of proof. In a *Chapman* analysis, the beneficiary of the error -- the state -- has the burden of proving that the error did not affect the outcome.

Chapman, 386 U.S. at 24. The court below, however, puts the burden on the defendant to demonstrate the opposite.

Second, the analysis gives no consideration to the nature of the error and its effect on the jury. The terms "grave uncertainty" and "actual substantial doubt," (J.A. 2), "suggest a higher degree of doubt than is required for acquittal under the reasonable doubt standard." *Cage*, 111 S. Ct. at 330. Recognizing that juries are presumed to follow the instructions they have been given, *see Yates*, 111 S. Ct. at 1893, the instruction made possible a conviction "based on a degree of proof below that required by the Due Process Clause," *Cage*, 111 S. Ct. at 330, by overstating the degree of uncertainty necessary to return a judgment of acquittal and by referring to "moral certainty" rather than evidentiary certainty. *Id.* The court's own weighing of the evidence completely ignores the question of how the instruction operated on the jury to the petitioner's detriment.

Third, the analysis clearly substitutes the reviewing court's consideration of the evidence for that of a properly instructed jury, contrary to this Court's instructions in *Bollenbach*, *Carella* and *Yates*. Lacking any guidance from jury findings of fact, the opinion simply reflects the reviewing court's own choices. The jury had several reasons to discredit Hillhouse's testimony that petitioner fired the fatal shot: Hillhouse's total immunity from prosecution, his incarceration through trial, the need for medical treatment following his interrogation by police, his initial statement to the police making mention only of "Bub," and the square conflict between the testimony of two defense witnesses, who recounted Hillhouse's statement that he was beaten by police, and Hillhouse's denial both that he was beaten and that he made any such statements. The Louisiana Supreme Court simply *chose* to believe Hillhouse, calling his testimony "unrefuted" despite the above, and altogether ignoring the reasons why that testimony might not be credited by a jury.

The Louisiana Supreme Court also *chose* to rely on circumstantial evidence as corroboration for Hillhouse. The circumstantial evidence, however, is linked to Sullivan principally by Hillhouse. It is Hillhouse who testified that the apartment where the gun and clothing were recovered was shared by Sullivan and his "wife," Hillhouse who linked Sullivan to the clothing which was said to be worn during the crime, and Hillhouse who testified that the watch worn by Sullivan when arrested "looked like" the watch that was taken during the robbery. The "corroboration" is part of the court's original choice to believe the testimony of an accomplice.

All this highlights the violence being done to the Sixth Amendment. The case comes to rest on the credibility of a single witness -- an accomplice enlisted by the government, perhaps after a beating by police, on a grant of total immunity -- to testify against a citizen accused. The determination whether to believe that government witness is being made as an original question -- without reference to any jury findings made beyond a reasonable doubt -- by representatives of the same government, not by citizens. The structural interposition of the jury between the government and the accused has been completely breached. The possibility that Hillhouse was lying, coerced by police brutality into fingering the person the police "figured" did it and already happened to have in custody, and rewarded by complete freedom if he stuck to that story, is resolved by the very government that brings the charge. This is precisely the vice the Sixth Amendment was intended to prevent.

The Louisiana Supreme Court's opinion demonstrates the futility of a principled application of harmless error analysis to an instruction that lowers the government's burden below that required by the Due Process Clause. Where there are contested issues of fact, no whole-record analysis can avoid the substitution of appellate fact-finding for non-existent jury findings beyond a reasonable

doubt. An accused constitutionally entitled to be convicted only on a jury's certainty about the facts is convicted instead on an appellate court's speculations born of reading the "dead record." *Bollenbach*, 326 U.S. at 615. To give life to the guarantees of the Constitution, the conviction must be reversed and John Sullivan afforded a trial by jury, with the benefit of a jury's determination of reasonable doubt.

CONCLUSION

Petitioner respectfully requests that the judgment affirming his conviction be reversed and that the case be remanded for a new trial.

Dated: December 3, 1992

Respectfully submitted,

William J. Keppel
Counsel of Record
Michael J. Wahoske
Christopher J. Riley
Tamara J. Byram
Karen A. Fairbairn
DORSEY & WHITNEY
220 South Sixth Street
Minneapolis, MN 55402
Telephone: (612) 340-2600

John Wilson Reed
GLASS & REED
338 Lafayette Street
New Orleans, LA 70130
Telephone: (504) 581-9065

Attorneys for Petitioner

(8)

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JOHN L. SULLIVAN,

Petitioner,

versus

STATE OF LOUISIANA,

Respondent.

On Writ Of Certiorari To The Supreme Court For The State Of Louisiana

RESPONDENT'S BRIEF ON THE MERITS

HARRY F. CONNICK
District Attorney
Of Orleans Parish

JACK PEEBLES
Assistant District Attorney
Of Orleans Parish
Counsel of Record

619 South White Street
New Orleans, Louisiana 70119
Telephone: (504) 822-2414

Attorneys for Respondent

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
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QUESTION PRESENTED

Whether errors committed by the trial court in defining reasonable doubt contributed to the verdict obtained in petitioner's trial.

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No. 92-5129

In The

Supreme Court of the United States

October Term, 1992

JOHN L. SULLIVAN,

Petitioner,

versus

STATE OF LOUISIANA,

Respondent.

On Writ Of Certiorari
To The Supreme Court For The
State Of Louisiana

RESPONDENT'S BRIEF ON THE MERITS

MAY IT PLEASE THE COURT:

The instant criminal case is before this Court on writ of certiorari to the Supreme Court of the State of Louisiana. For reasons stated below, the respondent, State of Louisiana, respectfully urges this Court to affirm the holding of the Louisiana Supreme Court.

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition Below:

Petitioner John L. Sullivan was convicted of first degree murder after a jury trial in the Criminal District Court for the Parish of Orleans, Louisiana, and sentenced to death. His trial began on May 26 and concluded on May 27, 1982. The jury charge on reasonable doubt given during the guilt phase of the trial was similar to that later held constitutionally deficient in *Cage v. Louisiana*, 498 U.S. 39, 111 S.Ct. 328, 112 L.Ed.2d 339 (1990) (per curiam).

On direct appeal the Supreme Court of Louisiana affirmed the conviction, holding that the instruction on reasonable doubt, though erroneous, was harmless error. *State v. Sullivan*, 596 So.2d 177 (La. 1992). The Louisiana court also found that petitioner's trial counsel was ineffective in the penalty stage of the trial, and vacated the sentence. The court remanded for a new sentencing hearing. Applications for rehearing by petitioner and respondent were denied on April 9, 1992. Petitioner timely sought review in this Court and on October 19, 1992 this Court granted petitioner's application for certiorari.

B. The Trial Facts:

A complete statement of the facts of the offense in this case is included in the opinion rendered by the Louisiana Supreme Court. *State v. Sullivan*, 596 So.2d 177 (La. 1992) (J.App. 11). Briefly, petitioner Sullivan was convicted of shooting to death a patron of a New Orleans bar during a robbery attempt. Sullivan was identified at

trial by the co-perpetrator of the robbery, Michael Hillhouse, as the trigger-man. A barmaid positively identified Hillhouse and Sullivan in court as the persons who had committed the armed robbery, and she testified that shortly after she heard the shotgun blast which killed the patron of the bar, she saw Sullivan holding a shotgun to a customer's head. *Id.* at 180 (J.App. 14). Only one shotgun was used during the robbery-murder.

Sullivan, after shooting the patron with a shotgun, brought the co-perpetrator to his girlfriend's apartment, where he left the shotgun, and clothing he wore during the robbery. The two perpetrators were arrested on a drinking spree a few hours later when police identified them from descriptions given by surviving patrons of the bar. At trial the barmaid identified a jacket taken from the girlfriend's apartment as the jacket worn by Sullivan at the time of the murder. *Id.* at 180 (J.App. 14).

A firearms identification expert at trial identified the shotgun found at the girlfriend's apartment as the one which fired the shot that killed the victim. Sullivan did not testify during the guilt phase of the trial. The Louisiana Supreme Court noted that "the testimony of Hillhouse [the co-perpetrator] fingering Sullivan as the leader and triggerman remains unrefuted, . . . ", and that in addition to the testimony of the barmaid [Stephanie Lowery],

> . . . "other evidence, albeit circumstantial, corroborates Hillhouse's version of the facts. The murder weapon, the flight bag, and the suit jacket worn by Sullivan during the crime were later found at the apartment shared by Sullivan and Wold [Sullivan's girlfriend]. It was to this

apartment that Sullivan had brought Hillhouse to meet his 'wife' the morning of the murder."

Id. at 186 (J.App. 27).

During the guilt phase of the trial, the court instructed the jury with regard to "reasonable doubt":

> "If you entertain any reasonable doubt as to any fact or element necessary to constitute the defendant's guilt, it is your sworn duty to give him the benefit of that doubt and return a verdict of acquittal. Even where the evidence demonstrates a probability of guilt, yet if it does not establish it beyond a reasonable doubt, you must acquit the accused. This doubt must be a reasonable one; that is, one founded upon a real, tangible, substantial basis, and not upon mere caprice, fancy or conjecture. It must be such a doubt as would give rise to a *grave uncertainty*, raised in your minds by reason of the unsatisfactory character of the evidence; one that would make you feel that you had not an abiding conviction to a *moral certainty* of the defendant's guilt. If, after giving a fair and impartial consideration to all of the facts in the case, you find the evidence unsatisfactory upon any single point indispensably necessary to constitute the defendant's guilt, this would give rise to such a reasonable doubt as would justify you in rendering a verdict of not guilty.
>
> A reasonable doubt is not a mere possible doubt. It should be an actual or *substantial doubt*. It is such a doubt as a reasonable person would

> seriously entertain. It is a *serious doubt*, for which you could give good reason."
>
> (emphasis added)
> *Id.* at 185 (footnote 3) (J.App. 2-3)
> Trial transcript at 566-68

The jury found Sullivan guilty as charged of first-degree murder[1] and, after a penalty hearing, recommended the death penalty.

C. The Appeal to the Louisiana Supreme Court:

On appeal to the Louisiana Supreme Court Sullivan argued, *inter alia*, that the jury instructions on reasonable doubt violated the prohibition of *Cage v. Louisiana*, 498 U.S. 39, 111 S.Ct. 328, 112 L.Ed.2d 339 (1990). In *Cage* this Court found that the terms "grave" and "substantial" suggest a higher degree of doubt than that required by the reasonable doubt standard.[2] The Court in *Cage* concluded that when those terms were considered in reference to "moral," as opposed to "evidentiary" certainty, a reasonable juror could find guilt based upon proof below the standard required by the Due Process Clause.[3] On

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[1] First degree murder is "the killing of a human being: . . . [w]hen the offender has specific intent to kill or to inflict great bodily harm and is engaged in the perpetration or attempted perpetration of . . . armed robbery . . . " La.Rev.Stat. 14:30(A)(1)

[2] *Cage v. Louisiana*, 111 S.Ct. 328, 329-30 (1990).

[3] *Id.*, 111 S.Ct. at 330. The Court based its holding on *In re Winship*, 397 U.S. 358 (1970). In *Winship*, the Court held that the Due Process Clause requires that an accused not be convicted "except upon proof beyond a reasonable doubt of every fact

remand, the Louisiana Supreme Court in *State v. Cage* held that an erroneous reasonable doubt instruction is a trial error subject to harmless error analysis and that the instruction in that case was harmless beyond a reasonable doubt. *State v. Cage*, 583 So.2d 1125 (La. 1991), *cert. denied*, 112 S.Ct. 211 (1991).

The State agreed with petitioner that the jury charge was similar to the charge given in *Cage*. Both charges were standard, stock "reasonable doubt" jury charges included in Louisiana judges' bench books, which have been given to juries in Louisiana for as long as Louisiana lawyers can remember.[4]

The Louisiana Supreme Court concluded that the jury charge in Sullivan's trial was erroneous, but concluded that the instruction did not contribute to the jury's finding of guilt, citing *State v. Cage*, *supra*. *State v. Sullivan*,

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necessary to constitute the crime with which he is charged." *Id.* at 364.

[4] The erroneous *Cage* jury instruction regarding reasonable doubt has been used for years by district courts in Louisiana, and when objected to, its use has been affirmed on appeal. *State v. Cage*, 554 So.2d 39 (La. 1989); *State v. Messiah*, 538 So.2d 175 (La. 1988), *cert. den.*, ___ U.S. ___, 110 S.Ct. 880 (1990); *State v. Rault*, 445 So.2d 1203 (La. 1984); *cert. den.* 469 U.S. 873, 105 S.Ct. 225, 83 L.Ed.2d 154 (1984); *State v. Taylor*, 410 So.2d 224 (La. 1982); *State v. Monroe*, 397 So.2d 1258 (La. 1981), *cert. den.*, 463 U.S. 1229, 103 S.Ct. 3571, 77 L.Ed 1411 (1982); *State v. Stramiello*, 392 So.2d 425 (La. 1981); *State v. West*, 552 So.2d 478 (La. App. 4th Cir. 1989), *writ granted*, 560 So.2d 33 (1990); *State v. Washington*, 522 So.2d 628 (La. App. 4th Cir. 1988); *Bently v. State*, 523 So.2d 1321 (La. 1988), *cert. den.* 109 S.Ct. 94, 102 L.Ed. 70 (1988); *State v. Miller*, 489 So.2d 268 (La. App. 4th Cir. 1986), *writ den.*, 496 So.2d 1030 (La. 1986).

596 So.2d 177, at 185 (La. 1992). The Louisiana court affirmed petitioner's conviction and remanded for a new sentencing hearing.

SUMMARY OF ARGUMENT

Petitioner John Sullivan, facing capital murder charges, was entitled to be tried by a jury of his peers. He was entitled to have that jury decide the question of his guilt or innocence, and he was entitled to have the jury decide the question of his guilt or innocence based upon a burden-of-proof standard which required proof beyond a reasonable doubt in order to convict. *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). However, error in charging a jury, including the error made in petitioner's case, may not reach the level of constitutional error because of other instructions in the jury charge. *Cupp v. Naughton*, 414 U.S. 141, 94 S.Ct. 396, 38 L.Ed.2d 368 (1973).

Sullivan was tried by a jury. The jury did decide the question of his guilt or innocence, and the burden-of-proof standard used was one which required the State of Louisiana to prove his guilt beyond a reasonable doubt.

Errors were made by the trial judge when he described the burden-of-proof standard to the jury. He

did, however, clearly charge the jurors that if they entertained a reasonable doubt about any fact or element necessary to constitute Sullivan's guilt, they should acquit Sullivan. He also charged them that even if they found that the evidence demonstrated a probability of guilt, yet if it did not establish guilt beyond a reasonable doubt, they should acquit Sullivan. The errors occurred when the judge described a reasonable doubt as being a serious doubt, a substantial doubt, one which would give rise to a grave uncertainty, and one which would make a juror feel that he had not an abiding conviction to a moral certainty of Sullivan's guilt. These errors introduced ambiguity into the jury charge on reasonable doubt. However, because the concept of "reasonable doubt" is clear as used and because the improperly used descriptive terms did not significantly detract from the essential meaning of the concept of reasonable doubt, the jury charge did not create a reasonable likelihood that the jury judged Sullivan's guilt or innocence based upon a burden-of-proof charge below that required by the Due Process Clause.

Although an earlier case in this Court, *Cage v. Louisiana*, 498 U.S. ___, 111 S.Ct. 328, 112 L.Ed.2d 339 (1990) condemned a similar charge because jurors "could have" been led to use the wrong burden-of-proof standard, the Court has since disapproved the *Cage* standard for evaluating ambiguous jury instructions and has stated that the proper standard is whether the errors created a "reasonable likelihood" that the jury has applied the challenged instruction in a way that violates the Constitution. *Estelle v. McGuire*, 502 U.S. ___, 112 S.Ct. 475 (1991), at 482 n. 4.

The errors in the jury charge were trial errors under the analytical framework of *Arizona v. Fulminante*, 111 S.Ct. 1246 (1991).

Beyond a reasonable doubt, the errors complained of did not contribute to the verdict obtained. *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967).

ARGUMENT

THE ERRORS COMMITTED BY THE TRIAL COURT IN DEFINING REASONABLE DOUBT DID NOT CONTRIBUTE TO THE VERDICT OBTAINED IN PETITIONER'S TRIAL.

A. The Standard used in *Cage v. Louisiana* for Evaluating an Ambiguous Jury Charge has been Disapproved and Superseded.

This Court has modified the criterion for judging ambiguous jury charges since *Cage v. Louisiana* was decided. The Court held in *Cage* that a reasonable juror *could have* interpreted the jury instruction given at Cage's trial to allow a finding of guilt based on a degree of proof below that required by the Due Process Clause. *Cage*, 111 S.Ct. 328, at 330 (La. 1990). Later, in *Estelle v. McGuire*, 112 S.Ct. 475 (1991), this Court disapproved the test used in *Cage* and established the "reasonable likelihood" standard as appropriate for review of ambiguous jury instructions:

> "[I]n reviewing an ambiguous instruction such as the one at issue here, we inquire 'whether there is a reasonable likelihood that the jury has

applied the challenged instruction in a way' that violates the Constitution."

Id. at 482

The Court noted that language in *Cage* might be read as endorsing a different standard of review for jury instructions, and held that "we now disapprove the standard of review language in *Cage* and *Yates* [*v. Evatt*, 111 S.Ct. 1884], and reaffirm the standard set out in *Boyde* [*v. California*], 110 S.Ct. 1190 (1990)." *Estelle v. McGuire*, 112 S.Ct. 475 (1991), at 482 n. 4.

B. The Jury Charge on Reasonable Doubt in Petitioner's Trial is Subject to Harmless-Error Analysis.

The Louisiana Supreme Court assumed that the jury charge given at trial was erroneous because it was substantially similar to that given in *State v. Cage, supra*.[5] Thus, it viewed the question before it as "whether it

[5] The Louisiana Supreme Court decided *State v. Cage*, 583 So.2d 1125 (La. 1991), *cert. denied*, 502 U.S. ___, 112 S.Ct. 211, 116 L.Ed.2d 170 (1991), *supra*, on remand from this Court, using the criterion that the jury charge "could have" caused the jury to convict Cage through use of a burden-of-proof standard below that allowed by the Due Process Clause. *State v. Cage* was issued by the Louisiana court before this Court disapproved the "could have" criterion and adopted the "reasonable likelihood" test of *Estelle v. McGuire*, 112 S.Ct. 475, at 482 n. 4. The Louisiana high court in petitioner's case relied on *State v. Cage*, with its "could have" criterion, to conclude that the jury charge in petitioner's case was erroneous. *State v. Sullivan*, 596 So.2d 177, at 185 (La. 1992). Thus, the Louisiana Supreme Court has never evaluated the jury charge in petitioner's case using the appropriate criterion for determining whether the jury charge on reasonable doubt violated the Due Process Clause.

appears beyond a reasonable doubt that the erroneous instruction did not contribute to the jury's finding of guilt." *State v. Sullivan*, 596 So.2d 177, at 185 (La. 1992). The court concluded that the instruction did not contribute to the jury's finding of guilt, citing its previous *State v. Cage* decision in which it applied the analytical framework of *Arizona v. Fulminante*, 111 S.Ct. 1246 (1991). *State v. Sullivan*, 596 So.2d at 185.

The *Fulminante* framework requires a reviewing court to classify errors as either trial errors, which are subject to harmless error analysis, or as structural defects in the constitution of the trial mechanism, which defy analysis by harmless-error standards and thus remain subject to automatic reversal. *Fulminante*, 111 S.Ct., at 1265 (opinion of Chief Justice Rehnquist). The Louisiana court in *State v. Cage* held that an error in the jury charge was a trial error. *State v. Cage*, 583 So.2d 1125, 1127-28. It presumably came to the same conclusion in Sullivan's case because it cited *Cage* as authority for its holding. *State v. Sullivan*, 596 So.2d at 185; J.App. 27.

The State does not suggest that every jury charge is subject to harmless-error analysis. Certainly not every jury charge pertaining to burden-of-proof is subject to harmless-error analysis. Some such errors do affect the reliability of the fact-finding process and the errors cannot be quantitatively assessed. The State suggests no more than that an examination of the particular errors in the case now before the court leads to the conclusion that the errors are subject to quantitative assessment and in this case they did not affect the reliability of the fact-finding process.

In this case the jury was instructed that it must evaluate the evidence using the reasonable-doubt standard.[6] The jury was not told to consider the evidence without any burden-of-proof standard.[7] The jury was told that it could not use a probability-of-guilt standard.[8]

The errors in the jury instructions in the case before this Court were communicative errors, the effects of which can be reasonably measured or, in *Fulminante* terms, quantitatively assessed. They were attempts to describe a necessary concept for the jury.

Petitioner's contention that no error in a reasonable doubt instruction can be subject to harmless error analysis if issues of fact are contested is contrary to both logic and experience. If, for instance, someone inserted the phrase "Reasonable doubt is like a bird singing on a window sill" into an otherwise adequate and complete jury charge on reasonable doubt, the phrase would render the jury charge erroneous because reasonable doubt is in fact not at all like a bird singing on a window sill. Nonetheless, the error in the charge would be harmless. While this specific example is improbable, it nonetheless

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[6] The trial court instructed the jury:

"If you entertain any reasonable doubt as to any fact or element necessary to constitute the defendant's guilt, it is your sworn duty to give him the benefit of that doubt and return a verdict of acquittal. *Even where the evidence demonstrates a probability of guilt, yet if it does not establish it beyond a reasonable doubt, you must acquit the accused.* . . .
. . . " (emphasis supplied) J.App. 2

[7] See: *Jackson v. Virginia*, 443 U.S. 307, at 320 n. 14.

[8] See: *In re Winship, supra*, 397 U.S. 358 (1970).

demonstrates that the categorical refusal to consider harmless any error in a reasonable doubt jury charge on the ground that it cannot be harmless, is simply wrong. Each error must be examined, or assessed.

This Court may conclude that the errors committed do not rise to the level of constitutional error, which is the only type of error in state proceedings with which the Court is concerned. If the Court concludes that the erroneous statements do constitute constitutional error, then the Court must assess that error to determine whether it contributed to the jury verdict.

This Court may examine constitutional error under the trial-error/structural-defect analysis of *Fulminante*, or it may analyze constitutional error as the minority opinion in *Fulminante* suggested, "by considering the nature of the right at issue and the effect of [the] error upon the trial." *Arizona v. Fulminante*, 111 S.Ct. 1246, at 1255. The State suggests that these approaches are not contradictory, and that under either analysis the errors committed in the jury instructions in petitioner Sullivan's case can and should be subjected to harmless-error analysis.

The jury instruction occurred during the trial. The majority opinion in *Fulminante* cited eighteen cases, beginning with *Chapman v. California*, which involved trial error – "error which occurred during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt." *Fulminante*, 111 S.Ct. at 1263-64. Five of the cases cited in this part of

the majority opinion concerned errors in jury instructions:

> "See, e.g., *Clemons v. Mississippi*, 494 U.S. ___, 110 S.Ct. 1441, 1450-51, 108 L.Ed.2d 725 (1990) (unconstitutionally overbroad jury instructions at the sentencing stage of a capital case);. . . . *Carella v. California*, 491 U.S. 263, 109 S.Ct. 2419, 2421, 105 L.Ed.2d 218 (1989) (jury instruction containing an erroneous conclusive presumption); *Pope v. Illinois*, 481 U.S. 497, 501-504, 107 S.Ct. 1918, 1921-1923, 95 L.Ed.2d 439 (1987) (jury instruction misstating an element of the offense); *Rose v. Clark*, 478 U.S. 570, 106 S.Ct. 3101, 92 L.Ed.2d 460 (1986) (jury instruction containing an erroneous rebuttable presumption);. . . . *Kentucky v. Whorton*, 441 U.S. 786, 99 S.Ct. 2088, 60 L.Ed.2d 640 (1979) (failure to instruct the jury on the presumption of innocence);. . . . " *Id.* at 1263

In one of the cited cases, *Rose v. Clark*, the Court stated that, if a defendant was represented by counsel and was tried before an impartial adjudicator, any errors are strongly presumed to be subject to harmless error analysis. The Court reasoned that the central purpose of a criminal trial is to decide the factual questions of guilt or innocence and that, unless the errors affect the reliability of the fact-finding process, harmless error analysis should apply. *Rose v. Clark*, 478 U.S. at 577-78.

If this Court should conclude that the errors committed do rise to the level of constitutional error, the question then becomes whether error in the reasonable doubt jury instruction in petitioner's case affected the reliability

of the fact-finding process, so that harmless-error analysis cannot apply. Petitioner Sullivan suggests that an erroneous reasonable doubt instruction skews the framework of the trial and, thus, is a structural defect.

How shall an error committed during trial which, in theory, may have altered the basis on which the jury decided the case but in practice clearly had no effect on the outcome, be assessed? Does a reviewing court intrude into the jury's province of determining guilt or innocence by reviewing the evidence to determine whether the error was harmless? A majority of this Court answered these questions in *Rose v. Clark* by concluding that harmless error analysis, when applied to this type of trial error, does not impinge on the Sixth Amendment. The Court stated:

> "This question ['What is to be done about a trial error which, in theory, may have altered the basis on which the jury decided the case, but in practice clearly had no effect on the outcome?'] applies not merely to *Sandstrom* violations, but to other errors that may have affected *either the instructions the jury heard* or the record it considered – including errors such as mistaken admission of evidence, or unconstitutional comment on a defendant's silence, or erroneous limitation of a defendant's cross-examination of a prosecution witness. All of these errors alter the terms under which the jury considered the defendant's guilt or innocence, and all theoretically impair the defendant's interest in having a jury decide his case. The dissent's argument – that the Sixth Amendment forbids a reviewing court to decide the impact of a trial error on the outcome. . . . logically implies that all such errors are immune

from harmless-error analysis. Yet this Court repeatedly has held to the contrary."

(citations omitted) (emphasis supplied)
Rose v. Clark, 478 U.S. 570, 582 n. 11, 106 S.Ct. 3101, 3108 n. 11 (1986).

The *Fulminante* majority analysis requires that an error be quantitatively assessable in order to be classified as a trial error. This does not mean, however, that the effect of the error must always be present in the record. In *Fulminante* the Court noted the following errors which, although the effects of the errors were omitted from the record, were nonetheless subject to harmless-error analysis:

" . . . *Crane v. Kentucky*, 476 U.S. 683, 691, 106 S.Ct. 2142, 2147, 90 L.Ed.2d 636 (1986) (erroneous exclusion of defendant's testimony regarding the circumstances of his confession); *Delaware v. Van Arsdall*, 475 U.S. 673, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986) (restriction on a defendant's right to cross examine a witness for bias in violation of the Sixth Amendment Confrontation Clause); *Rushen v. Spain*, 464 U.S. 114, 117-118, and n. 2, 104 S.Ct. 453, 454-455, and n. 2, 78 L.Ed.2d 267 (1983) (denial of a defendants's right to be present at trial);. . . . *Coleman v. Alabama*, 399 U.S. 1, 10-11, 90 S.Ct. 1999, 2003-2004, 26 L.Ed.2d 3876 (1970) (denial of counsel at a preliminary hearing in violation of the Sixth Amendment Counsel Clause)."

Fulminante, 111 S.Ct. at 1263

Two factors may assist in evaluating whether the errors in jury instructions in this case are subject to

quantitative assessment. First, the jury instructions did not exclude any evidence from consideration by the jury, so that the evidence which the jury did consider can be quantitatively assessed. Second, the instructions did not exclude any issues from consideration by the jury. Thus, the Louisiana Supreme Court should have been able to reliably analyze the errors in order to determine whether they were harmless.

In *Yates v. Evatt*, 111 S.Ct. 1884 (1991), this Court applied harmless error analysis to an erroneous presumption of malice. The Court restated the *Chapman* test as "whether it appears 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.' " *Id.* at 1892. The Court further stated:

"To say that an error did not contribute to the verdict is. . . . to find that error unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record."

Id. at 1893

Such is an excellent description of the error in petitioner's case.

C. The Jury Charge on Reasonable Doubt Given in Sullivan's Trial Did Not Violate Sullivan's Right to Due Process of Law.

The State submits that the standard of review used in *Cage* and that now approved by *Estelle v. McGuire* are substantially different, and in petitioner Sullivan's case should lead to the conclusion that the jury instructions on

reasonable doubt given at his trial did not create a reasonable likelihood that the jury decided Sullivan's guilt using a burden-of-proof standard which violated his right to due process of law. Many events "could" occur which have no "reasonable likelihood" of occurring. Counsel "could" incidentally view the President on his walk to the Supreme Court Building for argument, but there is no "reasonable likelihood" that this will occur.

The State requests that this Court reevaluate the effect of the terms used in Sullivan's case which had been used in *Cage*, but in light of the *Estelle v. McGuire* criterion.

(1) *Reasonable Doubt*

The trial court charged the jury that if it entertained any reasonable doubt as to any fact or element necessary to constitute guilt, it should give Sullivan the benefit of that doubt and acquit him. The court also charged the jury that even if the evidence demonstrated a probability of guilt, if it did not establish guilt beyond a reasonable doubt the jury should acquit. J.App. 2.

The term "reasonable doubt" has clear meaning.[9] Attempts to define such a doubt, which have been

[9] See: *State v. Robinson*, 235 Or. 524, at 528, 385 P.2d 754 (1963) ("reasonable doubt" is a term so commonly known and understood that it requires no embellishment); *State of Oregon v. Mond*, 199 Or. 165, 193, 260 P.2d 474 (1953) (quoting *People v. Klein*, 305 Ill. 141, 137 N.E. 145 (1922)), that "[t]here is no more lucid definition of the term 'reasonable doubt' than the term itself"); *State v. Morey*, 25 Or. 241, at 257, 35 P. 655 (1894) (reasonable doubt is within the comprehension of every person capable

described in legal literature for over a century and a half, have failed.[10] However, the term is frequently used in popular literature, media, and art, as well as law, so that the concept is a familiar one. The term "beyond a reasonable doubt" has settled meaning. The State submits that those concepts used in the jury charge which were condemned in *Cage* did not detract from the commonly understood meaning of "reasonable doubt." They did not create a reasonable likelihood that the jury would be misled.

(2) *"Moral Certainty"*

The most ambiguous term used in the charge was "moral certainty." The jurors were instructed, in effect, that if they did not feel they had an abiding conviction to a moral certainty of Sullivan's guilt, then they had a reasonable doubt. This phrase has been used in criminal jury charges for over a century.[11] Although the term "moral certainty" was likely not helpful to the jury, its

of understanding common English and further definition cannot make it plainer).

[10] See, e.g., *United States v. Hall*, 854 F.2d 1036, 1037-39 (7th Cir 1988) (courts are strongly discouraged from attempting to define "reasonable doubt"); *United States v. Nolasco*, 926 F.2d 869, 872 (9th Cir.), *cert. den.* 112 S.Ct. 111, 116 L.Ed.2d 80 (1991) (trial court has discretion to define or not to define "reasonable doubt").

[11] It is usually traced back to Chief Justice Shaw's charge to the jury in *Commonwealth v. Webster*, 59 Mass (5 Cush) 295, 320 (1850). Chief Justice Shaw's charge has been the basis of the reasonable doubt instruction in many jurisdictions. McCormick, *Evidence* 963, Sec. 341 (3rd ed. 1984); Morano, "A Reexamination of the Development of the Reasonable Doubt Rule," 55 B.U.L.Rev. 507, 522-23 (1975).

use in the context of the instruction in the case before the Court was innocuous or, if anything, helpful to Sullivan.[12]

This Court held that a jury charge containing the admonition that "[p]roof beyond a reasonable doubt is such as will produce an abiding conviction in the mind to a moral certainty. . . . " was "certainly very favorable to the accused, and is sustained by respectable authority." *Miles v. United States*, 103 U.S. 304, at 312 (1880).

(3) *"Grave Uncertainty," "Actual or Substantial Doubt," and "Serious Doubt."*

The trial court below did not use the term "grave doubt" which was used in *Cage*, but did describe a reasonable doubt as one giving rise to a "grave uncertainty." The trial judge used the phrases "grave uncertainty," "actual or substantial doubt," and "serious doubt" in the jury instruction to contrast with doubt based upon "mere

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[12] See, e.g., McBaine, "Burden of Proof: Degrees of Belief," 32 Cal. L. Rev. 242, 258-59 (1944) ("To use the phrase moral certainty may convey the idea to the jury that absolute certainty is required."); *Monk v. Zelez*, 901 F.2d at 890 (use of the term "moral certainty" could mitigate the impact of other wording in the instruction that might have lessened the state's burden of proof); *United States v. Smaldone*, 485 F.2d 1333, 1348 (10th Cir. 1973), *cert. den.* 416 U.S. 936, 94 S.Ct. 1934, 40 L.Ed.2d 286 (1974) (inclusion of the term "moral certainty" mitigated the impact of an otherwise suspect reasonable doubt instruction); *State v. Crenshaw*, 51 Ohio App.2d 63, 5 O.O.3d 181, 366 N.E.2d 84, 85 (1977) ("firmly convinced" is an appropriate, but lesser standard than convinced to a "moral certainty").

caprice, fancy or conjecture" or "mere possible doubt." J.App. 2-3.

In *Taylor v. Kentucky*, 436 U.S. 478 (1978), decided eight years after *In re Winship*, this Court found that a jury instruction defining reasonable doubt as "a substantial doubt, a real doubt" was unclear, but declined to find it reversible error. *Id.* at 488. Some Federal circuit courts have also declined to find "substantial doubt" language to be reversible. *Murphy v. Holland*, 776 F.2d 470, 477 (4th Cir. 1985), vac. on other grounds, 475 U.S. 1138, 106 S.Ct. 1787 (1986); *Darnell v. Swinney*, 823 F.2d 299, 302 (9th Cir. 1987), *cert. den.* 484 U.S. 1059, 108 S.Ct. 1012, 98 L.Ed.2d 978 (1988).

The Louisiana Supreme Court had, until *Cage*, viewed the terms "serious doubt" and "grave uncertainty" as an accurate statement of the law when viewed in the context of the entire jury charge on reasonable doubt.[13]

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[13] In *State v. Stramiello*, 392 So.2d 425, 429 (La. 1980), the Louisiana Supreme Court found that an instruction using the phrase "grave uncertainty" in a reasonable doubt instruction was "neither erroneous nor prejudicial" when the charge was considered in its entirety. In *State v. Monroe*, 397 So.2d 1258, 1269 (La. 1981), *cert. denied*, 463 U.S. 1229 (1982), that court found that a trial judge's characterization of reasonable doubt as involving "serious doubt" and "grave uncertainty," when viewed in the context of the entire charge, was an "accurate statement of the law." In *State v. Taylor*, 410 So.2d 224 (La. 1982), the Louisiana Supreme Court concluded that the charge using the phrases "grave uncertainty" and "moral certainty" to define reasonable doubt could create some confusion, but was not reversible error. That court followed the *Taylor* reasoning in *State v. Messiah*, 538 So.2d 175, 184 n. 5 (La. 1988) *cert. denied*, 110 S.Ct. 880 (1990),

(4) *The Jury Instructions on Reasonable Doubt in Sullivan's Trial did not Create a Reasonable Likelihood that the Jury Decided Sullivan's Guilt Using a Burden-of-Proof Standard Which Violated Sullivan's Right to Due Process.*

This Court has clearly stated that the phrases and concepts involving "grave" doubt, "substantial" doubt, and "moral certainty," used in *Cage v. Louisiana*, should not again be used in jury charges on reasonable doubt. The Louisiana Supreme Court is "confident that a jury instruction like this one [in Sullivan's case] will not be used in future criminal proceedings." *State v. Sullivan*, 596 So.2d 177, at 186 n. 4. The State does not here seek reconsideration of the condemnation of the phrases. The State does submit that historic tolerance for the use of the condemned phrases by both state and federal courts militates against the conclusion that good faith use of the phrases by courts prior to *Cage* amounts to denial of due process of law.[14] Tolerance shown for the use of the phrases, the State submits, indicates less likelihood that the phrases detract from the commonly understood meaning of "reasonable doubt."

Other courts which have considered this issue have concluded, as did the majority of the Louisiana Supreme

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and in the direct appeal in *State v. Cage*, 554 So.2d 39, 41 (La. 1989).

[14] Improper jury instructions in state criminal trials may be undesirable, erroneous, or even universally condemned, without so infecting the entire trial that the resulting conviction violates due process. See: *Henderson v. Kibbe*, 431 U.S. 145, 154, 97 S.Ct. 1730, 1737 (1977) (federal habeas corpus relief) (quoting *Cupp v. Naughten*, 414 U.S. 141, at 147, 94 S.Ct. 396, at 400 (1973).

Court, that an erroneous reasonable doubt jury instruction is subject to harmless error analysis.[15]

D. The Errors in the Jury Instructions on Reasonable Doubt in Petitioner's Trial were Harmless Beyond a Reasonable Doubt.

The State submits that the errors committed by the trial judge below do not rise to the level of constitutional error. If the Court concludes that the errors may or do constitute constitutional error, the Court should review the record in its entirety before reversing the conviction for error that may be harmless. *Arizona v. Fulminante*, 111 S.Ct. 1246, 1264 (1991); *Rose v. Clark*, 106 S.Ct. at 3106;

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[15] *See*: *State v. Dullivan*, 523 A.2d 1353, 1355-56 (Conn.App.Ct. 1987) (erroneous reasonable doubt instruction subject to harmless error analysis, but evidence not sufficiently strong to conclude that the erroneous instruction did not contribute to the verdict); *Commonwealth v. Garcia*, 399 N.E.2d 460, 471-73 (Mass. 1980) (subjecting erroneous reasonable doubt instruction to harmless error analysis and finding erroneous instruction harmless because of overwhelming evidence of defendant's guilt); *see also Lanigan v. Maloney*, 853 F.2d 40, 48-50 (1st Cir. 1988) (constitutionally defective reasonable doubt instruction is not automatically reversible, although only rarely will the court find the error harmless beyond a reasonable doubt), *cert. denied*, 488 U.S. 1007 (1989); *State v. Gilchrist*, 591 A.2d 131, 136-37 (Conn.App.Ct.1991) (erroneous instruction failed to state that the prosecution must prove beyond a reasonable doubt that the defendant did not act in self-defense – subject to harmless error analysis, *appeal denied*, 593 A.2d 131 (Conn. 1991); *People v. Williams*, 558 N.E.2d 1258, 1267-68 (Ill.App.Ct. 1990) (erroneous instruction failed to state that the prosecution must prove beyond a reasonable doubt that the defendant was not insane – subject to harmless-error analysis).

United States v. Hasting, 461 U.S. 499, 103 S.Ct. 1974, 76 L.Ed.2d 96 (1982). Respondent submits that the facts of this case, as set out in detail in the opinion of the Louisiana Supreme Court and as recounted in the Statement of the Case, *supra*, p. 2-5, demonstrate that the erroneous statements in the jury charge as to reasonable doubt given in petitioner's trial were harmless beyond all reasonable doubt. See: *State v. Sullivan*, supra, 596 So.2d 177 (1992), at 179-181, 186; J.App. 11-23.

CONCLUSION

Respondent respectfully requests that the judgment of the Louisiana Supreme Court affirming petitioner's conviction be affirmed.

Respectfully submitted,

HARRY F. CONNICK
District Attorney
of Orleans Parish

JACK PEEBLES
Assistant District Attorney
of Orleans Parish
Counsel of Record

619 South White Street
New Orleans, Louisiana 70119
Telephone: (504) 822-2414

Attorneys for Respondent

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No. 92-5129

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1992

JOHN L. SULLIVAN,

Petitioner,

vs.

STATE OF LOUISIANA,

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF LOUISIANA

PETITIONER'S REPLY BRIEF ON THE MERITS

John Wilson Reed
GLASS & REED
338 Lafayette Street
New Orleans, LA 70130
Telephone: (504) 581-9065

William J. Keppel
Counsel of Record
Michael J. Wahoske
Christopher J. Riley
Tamara J. Byram
Karen A. Fairbairn
DORSEY & WHITNEY
220 South Sixth Street
Minneapolis, MN 55402
Telephone: (612) 340-2600

Attorneys for Petitioner

1992 - Dorsey & Whitney, 220 South Sixth Street, Minneapolis, MN 55402 - (612) 340-8863

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PETITIONER'S REPLY BRIEF ON THE MERITS

INTRODUCTION

The brief of the State of Louisiana is remarkable chiefly for its concessions and its contradictions. Although the State acknowledges in passing the Sixth Amendment right to a determination of guilt by a jury, Resp. Br. at 7, it altogether ignores the concomitant proscription against judicial determinations of guilt, and the leading cases of this Court which apply that principle.1/ Rather than addressing the question

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1/ *United States v. Martin Linen Supply Co.*, 430 U.S. 564 (1977); *Duncan v. Louisiana*, 391 U.S. 145 (1968); *United Brotherhood of Carpenters v. United States*, 330 U.S. 395 (1947); *Bollenbach v. United States*, 326 U.S. 607 (1946).

presented herein, for the most part the State engages instead in a lengthy comment on this Court's recent unanimous decision in *Cage v. Louisiana*, 111 S. Ct. 328 (1990) (per curiam), but then expressly disclaims any interest in seeking reconsideration of *Cage*. Resp. Br. at 22. And although it asserts that harmless error analysis is appropriate even for an error that reduces the state's core burden of proof, it makes no attempt to articulate or apply such an analysis to this case. That it made no attempt to do so, and made no response at all to Petitioner's Sixth Amendment arguments, is telling evidence that such an analysis cannot be undertaken without doing violence to Petitioner's Sixth Amendment right to have his guilt or innocence decided by a jury constitutionally instructed on the standard of proof.

ARGUMENT

The State concedes that the instruction on reasonable doubt given here was erroneous and ambiguous. Resp. Br. at 7-8. The State further concedes that at least some instructional errors which reduce the government's burden of proof would not be subject to harmless error analysis and, thus, would automatically invalidate a conviction. Resp. Br. at 11. But the State fails to offer any basis, let alone a constitutionally principled one, for distinguishing those errors in defining the burden of proof that are subject to harmless error analysis from those that are not. The State simply "suggests," Resp. Br. at 11, without analysis, that the error here is subject to harmless error review.

What the State fails to realize is that its concession that at least some instructional errors on burden of proof are not subject to harmless error review must ultimately stem from Sixth Amendment limitations. The constitutional concern with an erroneous reasonable doubt instruction is not merely the Due Process Clause violation of using the wrong standard of proof. The Sixth Amendment's requirement that *a jury* make the guilt determination circumscribes the remedy for the Due Process Clause violation and prevents a reviewing court from "curing" the defect by substituting its view of the evidence for that of a jury properly instructed on reasonable doubt. It is thus the Sixth Amendment which makes harmless error review constitutionally inapplicable, not just to some instructional errors on the standard of proof as admitted by the State, but to all such errors where factual guilt is contested. Where the reasonable doubt instruction is constitutionally erroneous, it is impossible for a reviewing court to determine whether the jury found guilt, or any element thereof, beyond a reasonable doubt. A reviewing court thus lacks any of the guideposts which permit harmless error analysis of other types of instructional error. *See Rose v. Clark*, 478 U.S. 570, 579-81 (1986).

The State devotes the bulk of its brief to various remarks concerning this Court's decision in *Cage*. These comments, it may be noted, are little more than a reprise of the arguments raised by the State in its briefs in *Cage* and already rejected by this Court.[2/] Taking the State at its

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2/ It may also be noted that the State's concern that the *Cage* decision itself, and its principled application here, displace many years of established law, and the State's contention that these decisions will have far-reaching effect, are both overstated and irrelevant. While those considerations may have some relevance to a retroactivity analysis in a future case, they do not apply to this case, which comes before the Court on direct review. (It bears noting that both the Louisiana Supreme Court and the United States Courts of Appeals for the Fourth and Fifth Circuits have rejected retroactive applications of *Cage*. *Louisiana ex rel. Taylor v. Whitley*, 606 So. 2d 1292 (La. 1992); *Skelton v. Whitley*, 950 F.2d 1037, 1043-46 (5th Cir.), *cert. denied*, 113 S. Ct. 102 (1992); *Adams v. Aiken*, 965 F.2d 1306, 1311-12 (4th Cir. 1992), *petition for cert. filed*, (U.S. Oct. 14, 1992) (No. 92-6259).) Moreover, under Louisiana's contemporaneous objection rule, *Louisiana v. Dobson*, 578

word that it is not seeking reconsideration of *Cage*, Resp. Br. at 22,3/ this argument is apparently now to be understood as an attempt to justify harmless error review of a constitutionally defective reasonable doubt instruction.

Reduced to its essence, the State's argument is that the language found erroneous in *Cage* is not so bad after all, so its use must have been harmless. The State first argues that the instruction is not all that erroneous because the term "reasonable doubt" was used in the instruction, and it has a meaning which is commonly

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So. 2d 533 (La. Ct. App.), *writ denied*, 588 So. 2d 1110 (La. 1991), *Cage* will apply to but a limited number of decisions still on direct review. *See* J.A. at 47 (Dennis, J., dissenting).

3/ The issue whether the reasonable doubt instruction given in this case was constitutionally erroneous is not properly before the Court in any event. In the Louisiana Supreme Court, the State conceded the similarity of the instructions and did not argue that the present instruction was not constitutionally erroneous. J.A. at 26; Original Brief of Appellee at 20. The Louisiana Supreme Court held the instruction erroneous, J.A. at 26-28, and the State did not petition or cross-petition this Court for review, nor petition the Louisiana Supreme Court for rehearing, on this issue. Finally, in its Brief in Opposition to Certiorari filed in this Court, the State conceded: "the jury's instruction on reasonable doubt during the guilt phase of the trial was constitutionally deficient under the standard of *Cage v. Louisiana*, 111 S. Ct. 328 (1990) (per curiam)." Br. Opp. at 2.

Similarly, the State overstates the import of footnote 4 of *Estelle v. McGuire*, 112 S. Ct. 475, 482 n.4 (1991), in which the Court merely clarified and reaffirmed the proper language for articulating the standard for determining whether an instruction is erroneous, which standard it had stated in *Boyde v. California*, 494 U.S. 370, 380 (1990), well before the decision in *Cage*. *See McGuire*, 112 S. Ct. at 482 n.4 ("we now disapprove the standard of review *language* in *Cage* and *Yates*, and reaffirm the standard set out in *Boyde*.") (emphasis added). There is no suggestion in the *McGuire* footnote that the Court questioned the holding of either of the two cases mentioned as having been imprecise in the language used for articulating the standard.

understood. Resp. Br. at 18-19. Putting aside the question of whether reasonable doubt is actually a "commonly understood" term and whether any "common understanding" comports with the degree of certainty required by the Due Process Clause, this argument ignores the fact that within the instruction this "commonly understood" term was erroneously defined. Since it must be presumed that the jury followed the complete instruction, *see, e.g., Yates v. Evatt*, 111 S. Ct. 1884, 1893 (1991), including the erroneous definition, the instruction essentially took from the jury any "common understanding" of the term and put in its place a definition that speaks in terms of "grave" and "substantial" doubt coupled with "moral" certainty. It must therefore be presumed that, whenever the jury evaluated evidence, it did so not against a common understanding of reasonable doubt but rather against the standard as defined. Because that standard as defined was constitutionally infirm, there remains no jury finding made to a constitutionally acceptable standard and thus no benchmark against which any harmless error analysis could be made. That the term "reasonable doubt" was used in the instruction, but then improperly defined away, thus adds nothing to make harmless error analysis constitutional here.

It may also be noted that the State's parsing of the language of the instruction only considers the erroneous terms individually. While the use of certain terms, considered individually, may not have been held erroneous in other contexts, the State cites no case where any court, let alone this Court, considered and upheld the *combination* of improper terms found unconstitutional in *Cage*. It was precisely this combination of erroneous terms working together ("grave uncertainty" and "actual substantial doubt . . . considered with the reference to 'moral certainty,' rather than evidentiary certainty," *Cage*, 111 S. Ct. at 329-30) that permitted the jury to interpret

"the instruction to allow a finding of guilt based on a degree of proof below that required by the Due Process Clause." *Id.* at 330.

For all of Respondent's rhetoric that the instructional error in this case may be quantitatively assessed, the simple fact is that neither the State nor any reviewing court is able to say that guilt, or any element thereof, was actually found by the jury beyond a reasonable doubt. Because of the Sixth Amendment's guarantee of Petitioner's right to have the determination of guilt beyond a reasonable doubt made by a jury, that simple fact is dispositive of the question presented here.

CONCLUSION

The judgment affirming Petitioner's conviction should be reversed and the case remanded for a new trial.

Dated: February 3, 1993

Respectfully submitted,

William J. Keppel
Counsel of Record
Michael J. Wahoske
Christopher J. Riley
Tamara J. Byram
Karen A. Fairbairn
DORSEY & WHITNEY
220 South Sixth Street
Minneapolis, MN 55402
Telephone: (612) 340-2600

John Wilson Reed
GLASS & REED
338 Lafayette Street
New Orleans LA 70130
Telephone: (504) 581-9065

Attorneys for Petitioner

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Respondent.

On Writ of Certiorari to the Supreme Court of the State of Louisiana

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BRIEF AMICUS CURIAE OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONER

BARRY S. SIMON
(Counsel of Record)
JOHN D. CLINE
WILLIAMS & CONNOLLY
725 Twelfth Street, N.W.
Washington, D.C. 20005
(202) 434-5000
(For the National Association of Criminal Defense Lawyers)

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BRIEF AMICUS CURIAE OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONER

STATEMENT OF INTEREST OF AMICUS CURIAE

The National Association of Criminal Defense Lawyers, Inc. (NACDL) is a District of Columbia non-profit corporation with a nationwide membership of more than 5,000 lawyers and 25,000 affiliate members. NACDL was founded over twenty-five years ago to promote study and research in the field of criminal defense law, to disseminate and advance the knowledge of the law in the field of criminal defense practice, and to encourage the integrity, independence, and expertise of defense lawyers.

Among NACDL's stated objectives is the promotion of the proper administration of criminal justice. Consequently, NACDL is concerned with the protection of individual rights and the improvement of the criminal law, its practices, and procedures. A cornerstone of this organization's objectives, and of the criminal justice system, is the fundamental constitutional protection of an individual's Sixth Amendment right to trial by jury and Fourteenth Amendment right not to be found guilty except on proof beyond a reasonable doubt. NACDL is very concerned about any decision that would undermine or dilute these constitutional guarantees, as would the adoption of the position taken by the Respondent in the instant case.

The Amicus Curiae Committee of the NACDL has discussed this case and decided that the issues are of such importance to defense lawyers and criminal defendants throughout the nation that NACDL should offer its assistance to the Court. Both the Petitioner and the Respondent have consented to NACDL's participation as Amicus Curiae, and letters of consent have been filed with this Court.

STATEMENT OF THE CASE

Amicus adopts the Petitioner's Statement of the Case.

SUMMARY OF THE ARGUMENT

A. This case lies at the intersection of two fundamental rights guaranteed to a criminal defendant: the right, under the Due Process Clause of the Fourteenth Amendment, to go free unless the prosecution proves each element of the charged offense beyond a reasonable doubt, *In re Winship*, 397 U.S. 358 (1970), and the right, under the Sixth Amendment as incorporated through the Fourteenth Amendment, to have a jury determine whether the prosecution has satisfied that burden, *Duncan* v. *Louisiana*, 391 U.S. 145 (1968). Harmless error review of an erroneous reasonable doubt instruction inevitably violates the Sixth Amendment right to a jury trial because it requires appellate factfinding in place of factfinding by the jury.

B. This Court has never applied harmless error analysis when an instruction prevented the jury from finding every element of the offense beyond a reasonable doubt. The Court has declared repeatedly that the absence of a reasonable doubt instruction requires automatic reversal. No Justice has expressed a contrary view. Although the Court has addressed a *failure* to instruct on reasonable doubt, there is no reason to distinguish between the omission of a reasonable doubt instruction and an instruction that is erroneous under *Cage* v. *Louisiana*, 111 S. Ct. 328 (1990) (per curiam). Neither instruction requires the jury to hold the prosecution to the burden of proof that due process requires. Harmless error review of either instruction would require impermissible factfinding by the appellate court.

C. The Sixth Amendment right to a jury trial bars application of harmless error analysis to an erroneous reasonable doubt instruction. Two lines of cases—one requiring automatic reversal when the trial court directs a verdict for the prosecution, and the other permitting

harmless error analysis when the trial court instructs the jury on an improper burden-shifting presumption—confirm this point. Under those cases, an instruction that prevents the jury from considering whether each element of the offense has been proved beyond a reasonable doubt requires automatic reversal, because harmless error analysis would involve judicial factfinding in violation of the defendant's jury trial right.

D. *Arizona* v. *Fulminante*, 111 S. Ct. 1246 (1991), holding that a coerced confession is subject to harmless error analysis, does not suggest a contrary result. In *Fulminante*, the jury had found the defendant guilty beyond a reasonable doubt. Thus, the Court had no occasion to address the violation of the Sixth Amendment jury trial guarantee that occurs when an appellate court determines in the first instance whether the evidence establishes the defendant's guilt beyond a reasonable doubt. The *Fulminante* Court's categorization of errors as "trial" errors, generally subject to harmless error review, and "structural" errors, for which automatic reversal is required, presupposed a jury finding of guilt beyond a reasonable doubt. *Fulminante* did not purport to overturn the Court's repeated conclusion that automatic reversal is required when an instruction prevents the jury from finding every element of the offense beyond a reasonable doubt.

ARGUMENT

I. THIS CASE LIES AT THE INTERSECTION OF TWO FUNDAMENTAL RIGHTS GUARANTEED TO A CRIMINAL DEFENDANT.

This case involves two fundamental rights of a citizen charged with a criminal offense: the right under the Due Process Clause to be acquitted unless the prosecution proves each element of the offense beyond a reasonable doubt, and the right under the Sixth Amendment to have a jury determine whether the prosecution has met the reasonable doubt standard. When the trial court violates the first right by reducing the prosecution's burden of proof through an improper jury instruction, harmless

error review of that instruction by an appellate court violates the Sixth Amendment jury trial right.

A. Proof Beyond a Reasonable Doubt.

Almost a quarter-century ago, this Court "explicitly h[e]ld that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364 (1970). The Court declared that the reasonable doubt standard "is a prime instrument for reducing the risk of convictions resting on factual error." *Id.* at 363; *see, e.g.*, *Jackson* v. *Virginia*, 443 U.S. 307, 315 (1979) (same). It continued:

> "There is always in litigation a margin of error, representing error in factfinding, which both parties must take into account. Where one party has at stake an interest of transcending value—as a criminal defendant his liberty—this margin of error is reduced as to him by the process of placing on the other party the burden of . . . persuading the factfinder at the conclusion of the trial of his guilt beyond a reasonable doubt."

In re Winship, 397 U.S. at 364 (quoting *Speiser* v. *Randall*, 357 U.S. 513, 525-26 (1958) (ellipsis added by *Winship* Court)).

In his concurrence in *Winship*, Justice Harlan similarly stressed the crucial role of the reasonable doubt standard in ensuring that innocent defendants are not erroneously convicted. *See id.* at 370-72 (Harlan, J., concurring). He declared that the reasonable doubt standard reflects society's judgment that "it is far worse to convict an innocent man than to let a guilty man go free." *Id.* at 372.

Two terms ago, this Court unanimously reaffirmed the central importance of the reasonable doubt standard. *Cage* v. *Louisiana*, 111 S. Ct. 328 (1990) (per curiam). Recognizing that the "reasonable doubt standard 'plays a vital role in the American scheme of criminal procedure,'" *id.* at 329 (quoting *In re Winship*, 397 U.S. at 363), the Court reversed a conviction that rested on an instruction which "allow[ed] a finding of guilt based on a degree of proof below that required by the Due Process Clause," *id.* at 330.[1] It is undisputed that the reasonable doubt instruction in this case closely resembles the charge that the Court unanimously held deficient in *Cage*. *See State* v. *Sullivan*, 596 So. 2d 177, 185 (La. 1992) ("The state concedes the charge was essentially the same as the charge found to be improper in *Cage*.").

B. Trial by Jury.

The Sixth Amendment guarantees the criminal defendant a trial "by an impartial jury of the State and district wherein the crime shall have been committed." U.S. Const. Amend. VI. Two years before *Winship*, the Court held that the Sixth Amendment right to a trial by jury applies to the states through the Fourteenth Amendment. *See Duncan* v. *Louisiana*, 391 U.S. 145 (1968). The Court declared that "[a] right to jury trial is granted to criminal defendants in order to prevent oppression by the Government." *Id.* at 155. It made clear that *judges* are among the government officials against whom the jury trial right protects the defendant:

> Those who wrote our constitutions knew from history and experience that it was necessary to protect against unfounded criminal charges brought to eliminate enemies *and against judges too responsive to the voice of higher authority.* The framers of the constitutions strove to create an independent judiciary but insisted upon further protection against arbitrary action. Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor *and against the compliant, biased, or eccentric judge.*

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[1] On remand from this Court, the Louisiana Supreme Court found that harmless error analysis could be applied to the erroneous instruction and that the error was harmless. *State* v. *Cage*, 583 So. 2d 1125, 1127-29 (La.), *cert. denied*, 112 S. Ct. 211 (1991).

Id. at 156 (emphasis added); *see, e.g., id.* (jury trial guarantee reflects "a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges"); *United States* v. *Martin Linen Supply Co.*, 430 U.S. 564, 572 (1977) (jury's "overriding responsibility is to stand between the accused and a potentially arbitrary or abusive Government that is in command of the criminal sanction"); *Taylor* v. *Louisiana*, 419 U.S. 522, 530 (1975) (jury protects against the "perhaps overconditioned or biased response of a judge").

C. The Relationship Between the Rights.

In combination, these rights guarantee that a citizen charged with a serious offense is entitled to go free unless a *jury* finds him guilty *beyond a reasonable doubt.* A citizen who requests a trial by jury cannot be convicted by a judge, even if the judge holds the prosecution to a standard of proof more demanding than reasonable doubt. *See, e.g., United States* v. *Martin Linen Supply Co.*, 430 U.S. at 572-73. Conversely, the citizen cannot be convicted by a jury under a standard of proof less stringent than reasonable doubt, even if the evidence against him is overwhelming. *See, e.g., Cage* v. *Louisiana*, 111 S. Ct. at 329-30.

This case implicates both rights. Petitioner stands convicted by a jury under a reasonable doubt instruction that "allow[ed] a finding of guilt based on a degree of proof below that required by the Due Process Clause." *Id.* at 330. No jury has found Petitioner guilty under the standard that due process requires. As the following Parts demonstrate, the Sixth Amendment jury trial guarantee bars *judges* from making the finding that the *jury* did not make.

II. THE COURT HAS REPEATEDLY DECLARED, BOTH BEFORE AND AFTER *CHAPMAN*, THAT FAILURE TO GIVE A REASONABLE DOUBT INSTRUCTION IS NOT SUBJECT TO HARMLESS ERROR ANALYSIS.

This Court has never applied harmless error analysis to an instruction that reduced the prosecution's burden

of proof below the reasonable doubt standard. Indeed, both before and after *Chapman* v. *California*, 386 U.S. 18 (1967), the Court has declared repeatedly—although it has never held—that failure to instruct the jury on the necessity of proof beyond a reasonable doubt mandates automatic reversal because harmless error analysis would substitute judicial factfinding for findings by the jury. Neither the Court nor any individual Justice has as much as hinted to the contrary. Although these cases address a failure to instruct on reasonable doubt, there is no difference of constitutional significance between the *omission* of a reasonable doubt instruction and an *erroneous* instruction such as the one in this case.

This Court first addressed harmless error review of an omitted reasonable doubt instruction almost a half-century ago. In a case involving the trial court's refusal to give a key instruction concerning the scope of criminal liability under the Sherman Act as limited by the Norris-LaGuardia Act, the Court declared: "To repeat, guilt is determined by the jury, not the court. The problem is not materially different from one where the evidence against an accused charged with a crime is well-nigh conclusive and the court fails to give a reasonable-doubt instruction. *It could not be said that the failure was harmless error.*" *United Brotherhood of Carpenters and Joiners* v. *United States*, 330 U.S. 395, 410 (1947) (emphasis added).[2]

The Court decided *Chapman* in 1967, holding for the first time that some constitutional errors were subject to harmless error analysis. *Chapman*, 386 U.S. at 22. Twelve years after *Chapman*, the Court declared:

> Our cases have indicated that *failure to instruct a jury on the necessity of proof of guilt beyond a reasonable doubt can never be harmless error.* See *Cool* v. *United States*, 409 U.S. 100. Cf. *Taylor* v. *Ken-*

[2] In dissent, Justice Frankfurter contested the Court's construction of the Norris-LaGuardia Act, but he did not dispute that the absence of a reasonable doubt instruction could never be harmless. *See* 330 U.S. at 413-22 (Frankfurter, J., dissenting).

> *tucky*, 436 U.S. 478. Thus, a defendant whose guilt was actually proved by overwhelming evidence would be denied due process if the jury was instructed that he could be found guilty on a mere preponderance of the evidence.

Jackson v. *Virginia*, 443 U.S. at 320 n.14 (emphasis added). Justice Stevens' concurrence, joined by Chief Justice Burger and Justice Rehnquist, did not take issue with the Court's observation concerning the reasonable doubt instruction.

In *Connecticut* v. *Johnson*, 460 U.S. 73 (1983), eight members of the Court made clear that failure to instruct on reasonable doubt mandates automatic reversal. The plurality of four Justices (Blackmun, Brennan, White & Marshall, JJ.) found that a conclusive presumption on the issue of intent was not subject to harmless error analysis. *See id.* at 84-88. Although the plurality did not expressly address whether a failure to instruct on reasonable doubt can be harmless, it follows *a fortiori* from its analysis that the absence of a reasonable doubt instruction mandates reversal.[3]

The four-Justice dissent in *Johnson* (Powell, J., joined by Burger, C.J., and Rehnquist & O'Connor, JJ.) took a broader view of harmless error than the plurality, but it made clear at two points that a failure to instruct on reasonable doubt cannot be harmless. The dissent noted that

> [b]ecause a presumption does not remove the issue of intent from the jury's consideration, it is distinguishable from other instructional errors that prevent a jury from considering an issue. See *Jackson* v. *Virginia*, 443 U.S. 307, 320, n.14 (1979) ("failure to instruct a jury on the necessity of proof of guilt

[3] Justice Stevens provided the fifth vote for affirmance on the ground that the state court had an adequate state-law basis for declining to apply harmless error analysis. *Connecticut* v. *Johnson*, 460 U.S. at 88-90 (Stevens, J., concurring in judgment). Justice Stevens did not address the reasonable doubt issue.

> beyond a reasonable doubt can never be harmless error") . . . .

Id. at 95 n.3. The dissent reiterated the point: "A *Sandstrom* [burden-shifting presumption] error . . . is not comparable to an instruction that can never be harmless—for example, *an instruction that fails to inform the jury that it must find guilt beyond a reasonable doubt.*" *Id.* at 98 n.6 (emphasis added).

Three years later, the Court adopted the harmless error analysis of the *Johnson* dissent for burden-shifting presumptions. Again the Court distinguished such presumptions from instructions that " 'prevent a jury from considering an issue,' " and again it cited footnote 14 from *Jackson*, noting with apparent approval that that decision had "suggest[ed] that failure to instruct a jury as to the reasonable-doubt standard cannot be harmless." *Rose* v. *Clark*, 478 U.S. 570, 580 n.8 (1986) (quoting *Connecticut* v. *Johnson*, 460 U.S. at 95 n.3 (Powell, J., dissenting)). Neither Justice Stevens' concurrence nor Justice Blackmun's dissent (joined by Justices Brennan and Marshall), which set forth a narrower view of harmless error analysis than the majority, took issue with the majority's position—implicit in its reference to footnote 14 of *Jackson*—that a failure to instruct on the reasonable doubt standard cannot be harmless.

Most recently, in *Arizona* v. *Fulminante*, 111 S. Ct. 1246 (1991), the dissent declared that the Court had "f[ound] it impossible to analyze in terms of harmless error the failure to instruct a jury on the reasonable doubt standard." *Id.* at 1255 (White, J., joined by Marshall, Blackmun & Stevens, JJ., dissenting) (citing *Jackson* v. *Virginia*, 443 U.S. at 320 n.14). The *Fulminante* majority did not address the applicability of harmless error review to a failure to instruct on reasonable doubt. *See id.* at 1263-66.

As this examination of the cases demonstrates, both before and after *Chapman* the Court has recognized repeatedly and without demur that a failure to instruct

the jury on reasonable doubt mandates automatic reversal. Any harmless error analysis would substitute factfinding by judges for factfinding by the jury—something the Sixth Amendment does not permit.

Although the cases address a *failure* to instruct on reasonable doubt, they apply equally—and perhaps with even greater force—to an *erroneous* reasonable doubt instruction such as the one in this case. In neither circumstance is the jury required to hold the prosecution to its constitutionally mandated burden of proof, and in neither circumstance can an appellate court be confident that the jury has found any element of the offense proven beyond a reasonable doubt. Harmless error analysis of either error would require factfinding by the appellate court in violation of the defendant's right to trial by jury.

Moreover, an erroneous reasonable doubt instruction may well be more damaging than an omitted instruction. This Court has recognized that "[a]n omission, or an incomplete instruction, is less likely to be prejudicial than a misstatement of the law." *Henderson* v. *Kibbe*, 431 U.S. 145, 155 (1977). That is plainly the case here. A jury instructed that the prosecution has the burden of proof but not told the extent of the burden could choose any standard from a preponderance of the evidence to absolute certainty. The jury might select a standard *less* favorable to the defendant than reasonable doubt (preponderance of the evidence), or it might select a *more* favorable standard (absolute certainty). By contrast, a jury receiving the instruction in this case (and presumably following it [4]) would certainly apply a standard less

[4] *See Yates* v. *Evatt*, 111 S. Ct. 1884, 1893 (1991). The empirical research suggests that differing definitions of reasonable doubt can have a powerful impact on the jury's verdict. A study conducted with college students as mock jurors deliberating over a simulation of an actual rape trial found that 9 of 38 juries convicted under a stringent reasonable doubt instruction, while 19 of 38 juries convicted under a more lax instruction containing some of the deficiencies present in the instruction given in this case. *See* Norbert L. Kerr, *et al.*, *Guilt Beyond a Reasonable Doubt: Effects of Concept Definition and Assigned Decision Rule on the Judgments of Mock Jurors*, 34 J. Personality & Soc. Psych. 282, 287, 291 (1976).

favorable to the defendant than reasonable doubt and therefore "below that required by the Due Process Clause." *Cage* v. *Louisiana*, 111 S. Ct. at 330. Accordingly, if *failure* to instruct on reasonable doubt mandates automatic reversal, as the Court has repeatedly declared, then an *erroneous* instruction must also require reversal without harmless error analysis.

This conclusion follows as well from the Court's citation of *Cool* v. *United States*, 409 U.S. 100 (1972) (per curiam), in footnote 14 of *Jackson*. *See Jackson* v. *Virginia*, 443 U.S. at 320 n.14. In *Cool*, decided five years after *Chapman*, the trial court had "repeatedly emphasized to the jury that the Government was obligated to prove guilt beyond a reasonable doubt," 409 U.S. at 106 (Rehnquist, J., dissenting), but the court also instructed the jury that it could credit exculpatory testimony by the defendant's alleged accomplice "'[i]f the testimony carries conviction and you are convinced it is true *beyond a reasonable doubt*,'" *id.* at 102 (opinion of the Court) (quoting trial court's instruction) (emphasis added by the Court).

Without applying harmless error analysis, the Court reversed the conviction under *Winship* because the accomplice instruction "reduced the level of proof necessary for the Government to carry its burden." *Id.* at 104. *Jackson*'s citation to *Cool* for the proposition that "failure to instruct a jury on the necessity of proof of guilt beyond a reasonable doubt can never be harmless error," 443 U.S. at 320 n.14, confirms that that principle applies to instructions that *reduce* the prosecution's burden of proof, as the instruction in this case did, just as it does to a complete failure to instruct on the reasonable doubt standard.

III. THIS COURT'S DIRECTED VERDICT AND BURDEN-SHIFTING PRESUMPTION CASES DEMONSTRATE THAT THE RIGHT TO TRIAL BY JURY BARS HARMLESS ERROR ANALYSIS OF AN ERRONEOUS REASONABLE DOUBT INSTRUCTION.

Apart from the Court's outright declarations that failure to give a reasonable doubt instruction requires automatic reversal, a comparison of cases holding (1) that automatic reversal is required when the trial court directs a verdict for the prosecution, and (2) that harmless error analysis is permissible when the trial court instructs the jury to apply a burden-shifting presumption, provides further support for that principle. These cases have held that when the jury finds every element of the offense beyond a reasonable doubt, some form of harmless error analysis may be appropriate for certain instructional errors. By contrast, when (as here) the jury makes no such findings, automatic reversal is required because harmless error analysis would violate the Sixth Amendment jury trial guarantee.

A. Directed Verdict.

In an unbroken series of decisions, this Court has recognized that a directed verdict in favor of the prosecution requires automatic reversal, no matter how overwhelming the evidence. *See, e.g., Carella* v. *California*, 491 U.S. 263, 266 (1989) (per curiam); *id.* at 268-69 (Scalia, J., concurring in judgment); *Rose* v. *Clark*, 478 U.S. at 578; *id.* at 593-94 (Blackmun, J., dissenting); *Connecticut* v. *Johnson*, 460 U.S. at 83-84 (plurality op.); *id.* at 95-96 (Powell, J., dissenting); *United States* v. *Martin Linen Supply Co.*, 430 U.S. at 572-73; *United Brotherhood of Carpenters and Joiners* v. *United States*, 330 U.S. at 408-09; *Sparf & Hansen* v. *United States*, 156 U.S. 51, 105 (1895). No Justice has disputed that a directed verdict for the prosecution would require automatic reversal.

This principle rests squarely on the defendant's Sixth Amendment right to trial by jury. A citizen charged

with a crime is entitled not to be convicted except upon a finding *by a jury* that the prosecution has proven its case beyond a reasonable doubt. "'[T]he question is not whether guilt may be spelt out of a record, but whether guilt has been found by a jury according to the procedure and standards appropriate for criminal trials.'" *Carella* v. *California*, 491 U.S. at 269 (Scalia, J., concurring in judgment) (quoting *Bollenbach* v. *United States*, 326 U.S. 607, 614 (1946)). A trial court's error in directing a verdict against the defendant "would not be cured by an appellate court's determination that the record evidence *unmistakably* established guilt, for that would represent a finding of fact by judges, not by a jury." *Id.* As the Court explained in *Rose* v. *Clark*,

> We have stated that "a trial judge is prohibited from entering a judgment of conviction or directing the jury to come forward with such a verdict . . . regardless of how overwhelmingly the evidence may point in that direction." *United States* v. *Martin Linen Supply Co.*, 430 U.S. 564, 572-573 (1977) (citations omitted). Accord, *Carpenters* v. *United States*, 330 U.S. 395, 408 (1947). This rule stems from the Sixth Amendment's clear command to afford jury trials in serious criminal cases. See *Duncan* v. *Louisiana*, 391 U.S. 145 (1968). Where that right is altogether denied, the State cannot contend that the deprivation was harmless because the evidence established the defendant's guilt; the error in such a case is that the wrong entity judged the defendant guilty.

478 U.S. at 578 (ellipsis added by *Rose* Court). In short, application of harmless error analysis to a directed verdict for the prosecution would violate a defendant's Sixth Amendment right to a trial by jury.

B. Burden-Shifting Presumptions.

By contrast to cases in which the trial court has directed a verdict against the defendant, the Court has held that an instruction containing an improper burden-shifting presumption is subject to harmless error analysis. *See, e.g., Yates* v. *Evatt*, 111 S. Ct. at 1892-95;

Carella v. *California*, 491 U.S. at 266-67; *Rose* v. *Clark*, 478 U.S. at 579-82. The Court expressly rejected the contention that such analysis violated the defendant's right to trial by jury. *See id.* at 582 n.11.

The *Rose* Court's manner of distinguishing a burden-shifting presumption from a directed verdict bears squarely on the question presented here. The Court concluded that applying harmless error analysis to an improper presumption does not invade the jury's role because the jury still must find every element of the offense beyond a reasonable doubt:

> Nor is *Sandstrom* [burden-shifting] error equivalent to a directed verdict for the State. When a jury is instructed to presume malice from predicate facts, it still must find the existence of those facts beyond a reasonable doubt. . . . In many cases, the predicate facts conclusively establish intent, so that no rational jury could find that the defendant committed the relevant criminal act but did not *intend* to cause injury. . . . In that event the erroneous instruction is simply superfluous: the jury has found, in *Winship*'s words, "every fact necessary" to establish every element of the offense beyond a reasonable doubt.

Id. at 580-81 (emphasis in original; footnote omitted). In a footnote following the first sentence quoted above, *Rose* made clear that a failure to instruct on reasonable doubt (unlike a presumption) *is* "equivalent to a directed verdict for the State" and therefore cannot be harmless:

> "Because a presumption does not remove the issue of intent from the jury's consideration, it is distinguishable from other instructional errors that prevent a jury from considering an issue." *Connecticut* v. *Johnson*, 460 U.S., at 95, n.3 (Powell, J., dissenting). Cf. *Jackson* v. *Virginia*, 443 U.S. 307, 320, n.14 (1979) (suggesting that failure to instruct a jury as to the reasonable-doubt standard cannot be harmless).

Id. at 580 n.8.

Pope v. *Illinois*, 481 U.S. 497 (1987), involving a misinstruction on an element of the offense, draws the same distinction as *Rose*. In *Pope*, an obscenity prosecution, the trial court erroneously instructed the jury to determine the "value" prong of the three-part obscenity test in *Miller* v. *California*, 413 U.S. 15 (1973), according to community standards, rather than according to a "reasonable person" standard. *Pope* v. *Illinois*, 481 U.S. at 499-501. In dissent, Justice Stevens contended that application of harmless error analysis to this instruction would violate the defendants' Sixth Amendment right to trial by jury. *Id.* at 509 (Stevens, J., dissenting). He declared: "The harmless-error doctrine may enable a court to remove a taint from proceedings in order to *preserve* a jury's findings, but it cannot constitutionally *supplement* those findings." *Id.* (emphasis in original).

The *Pope* majority did not dispute the principle on which Justice Stevens rested his dissent, but it disagreed with his conclusion that harmless error analysis of the trial court's misinstruction would require the appellate court to "supplement" the jury's findings. *See id.* at 502-03. The Court found the misinstruction comparable to the burden-shifting presumption in *Rose*. It noted that

> [t]he error in *Rose* did not entirely preclude the jury from considering the element of malice, [*Rose* v. *Clark*, 478 U.S.] at 580, n.8, and the fact that the jury could conceivably have had the impermissible presumption in mind when it considered the element of malice was not a reason to retry the defendant if the facts that the jury necessarily found established guilt beyond a reasonable doubt. . . . Similarly, in the present cases the jurors were not precluded from considering the question of value: they were informed that to convict they must find, among other things, that the magazines petitioners sold were utterly without redeeming social value.

Id. at 503. Thus, in *Pope*, as in *Rose* (but unlike with a directed verdict), the Court relied on the conclusion that the jury found every element of the offense beyond a reasonable doubt.

C. Erroneous Reasonable Doubt Instruction.

The directed verdict and burden-shifting presumption cases establish two basic principles. *First*, when the jury finds every element of the offense beyond a reasonable doubt, instructional errors (and other trial errors) generally are subject to some form of harmless error analysis without violating the Sixth Amendment right to trial by jury.[5] *Second*, when an instruction prevents the jury from finding every element of the offense beyond a reasonable doubt, it cannot be harmless no matter how overwhelming the evidence, because the harmless error analysis would necessarily involve factfinding by the appellate court in violation of the Sixth Amendment jury trial guarantee.

An erroneous reasonable doubt instruction—like a directed verdict for the prosecution—falls within the second of these rules. *See, e.g., Rose* v. *Clark*, 478 U.S. at 580 n.8; *Jackson* v. *Virginia*, 443 U.S. at 320 n.14; *Lanigan* v. *Maloney*, 853 F.2d 40, 49-50 (1st Cir. 1988), *cert. denied*, 488 U.S. 1007 (1989). When the jury receives a faulty reasonable doubt instruction, as the jury did in this case, it finds *no* elements of the offense beyond a reasonable doubt. There is no set of jury findings beyond a reasonable doubt against which the appellate court can measure the effect of the error. *See, e.g., State* v. *Cage*, 583 So. 2d 1125, 1131-34 (La.) (Dennis, J., dissenting), *cert. denied*, 112 S. Ct. 211 (1991); Henry A. Diamond, *Reasonable Doubt: To Define, or Not to Define*, 90 Colum. L. Rev. 1716, 1735 (1990) (student note). Any harmless error analysis would necessarily "answer a purely hypothetical question, viz., whether, if the jury *had been* instructed correctly, it *would have* found that the state proved [the elements of the offense] beyond a reasonable doubt." *Yates* v. *Evatt*, 111 S. Ct.

[5] The precise nature of the harmless error analysis—like the availability of harmless error analysis in the first place—must be guided by the constitutional mandate that the facts be found by the jury, and not by judges. *See, e.g., Yates* v. *Evatt*, 111 S. Ct. at 1898 (Scalia, J., concurring).

at 1898 (Scalia, J., concurring) (emphasis in original). But "[w]hile such a hypothetical inquiry ensures that the State has, in fact, proved [the elements of the offense] beyond a reasonable doubt, it does not ensure that it has proved [those] element[s] beyond a reasonable doubt *to the satisfaction of a jury*." *Id.* (emphasis in original).

It bears repeating that the Sixth Amendment jury trial guarantee "reflect[s] a fundamental decision about the exercise of official power—a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges." *Duncan* v. *Louisiana*, 391 U.S. at 156. That protection against *judges* means little if harmless error analysis can occur in the absence of a jury verdict based on findings beyond a reasonable doubt. When appellate judges speculate about what the jury *would* have done *if* it had been directed to apply the reasonable doubt standard, that "represent[s] a finding of fact by judges, not by a jury." *Carella* v. *California*, 491 U.S. at 269 (Scalia, J., concurring in judgment). The Sixth Amendment prohibits judges from thus usurping the jury's role.

IV. *FULMINANTE* DID NOT DISPLACE THE PRINCIPLES SET FORTH ABOVE.

The court below ignored both the cases and the principles set forth above. It never mentioned the Sixth Amendment or the right to trial by jury. Relying solely upon its earlier decision in *Cage*, which in turn rested upon the distinction drawn in *Fulminante* between "trial" errors and "structural" errors, the court held that the erroneous reasonable doubt instruction in Petitioner's trial is subject to harmless error analysis. *State* v. *Sullivan*, 596 So. 2d at 185.

The Louisiana Supreme Court misread *Fulminante*. The issue there was whether the introduction of a coerced confession mandates automatic reversal. *See* 111 S. Ct. at 1263-66. Unlike this case, the jury in *Fulminante* had found the defendant guilty beyond a reasonable doubt. Because the jury had reached a verdict beyond a reason-

able doubt on every element of the offense, the harmless error analysis did not *itself* present a Sixth Amendment jury trial issue, as it does here. *See Rose* v. *Clark*, 478 U.S. at 582 n.11. The Court did not address—and had no occasion to address—the Sixth Amendment issue that arises when an appellate court applies harmless error analysis in the absence of a jury verdict of guilt beyond a reasonable doubt. The Court therefore did not purport to call into question its repeated declarations that the failure to instruct on reasonable doubt, like a directed verdict for the prosecution, mandates automatic reversal.[6]

Having no need to consider whether the harmless error review itself presented a Sixth Amendment issue, the *Fulminante* Court went directly to the issue before it: whether introduction of a coerced confession at trial is an error for which automatic reversal is required. In its analysis of this question, the Court grouped constitutional errors into two broad categories: "trial errors," for which harmless error analysis generally is appropriate, and "structural defects in the constitution of the trial mechanism," which require automatic reversal. 111 S. Ct. at 1264-65.

The *Fulminante* Court identified certain characteristics of errors classified as "structural" and therefore not subject to harmless error review. For example, if the

[6] The *Fulminante* Court listed 18 previous cases in which the Court had applied harmless error analysis to constitutional errors. *See* 111 S. Ct. at 1263. In every case, the jury had found the defendant guilty beyond a reasonable doubt. Under the *Rose* analysis, the harmless error review in those cases did not *itself* violate the Sixth Amendment jury trial guarantee, because the appellate judges were not called upon to determine in the first instance whether the prosecution had proved each element beyond a reasonable doubt. Instead, the inquiry—permissible under the Sixth Amendment, according to *Rose*—was "whether it appears 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" *Yates* v. *Evatt*, 111 S. Ct. at 1892 (quoting *Chapman* v. *California*, 386 U.S. at 24); *cf.* Lee E. Teitelbaum, *et al.*, *Evaluating the Prejudicial Effect of Evidence: Can Judges Identify the Impact of Improper Evidence on Juries?*, 1983 Wis. L. Rev. 1147, 1176-92 (discussing the difficulties of harmless error analysis).

impact of an error cannot be "quantitatively assessed," automatic reversal is required. *Id.* at 1264; *cf. Holloway* v. *Arkansas*, 435 U.S. 475, 490-91 (1978). Similarly, an error that affects "[t]he entire conduct of the trial from beginning to end" is "structural" and cannot be harmless. *Arizona* v. *Fulminante*, 111 S. Ct. at 1265. An error that "transcends the criminal process" requires automatic reversal, as do errors that "affect[] the framework within which the trial proceeds" and those that deprive the defendant of protections without which "'a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair.'" *Id.* (quoting *Rose* v. *Clark*, 478 U.S. at 577-78).

Under the *Fulminante* Court's taxonomy of errors, an erroneous reasonable doubt instruction plainly is "structural" and therefore requires automatic reversal. The impact of the error cannot be "quantitatively assessed." *See, e.g., State* v. *Cage*, 583 So. 2d at 1135 (Dennis, J., dissenting); *State* v. *Williams*, 828 P.2d 1006, 1031 (Or.) (Unis, J., dissenting), *cert. denied*, 61 U.S.L.W. 3260 (1992). The error affects "[t]he entire conduct of the trial from beginning to end." *See, e.g., State* v. *Cage*, 583 So. 2d at 1135 (Dennis, J., dissenting). And the error "transcends the criminal process," "affect[s] the framework within which the trial proceeds," and deprives the defendant of a protection without which "a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair." *See, e.g., id.; Perez* v. *Irwin*, 963 F.2d 499, 503 (2d Cir. 1992); *State* v. *Williams*, 828 P.2d at 1031 (Unis, J., dissenting).

But these are *secondary* reasons for requiring automatic reversal when the trial court reduces the prosecution's burden of proof. The principal difficulty with harmless error analysis for an erroneous reasonable doubt instruction (as for a directed verdict for the prosecution) "'is that the wrong entity judge[s] the defend-

ant guilty.'" *Carella* v. *California*, 491 U.S. at 269 (Scalia, J., concurring in judgment) (quoting *Rose* v. *Clark*, 478 U.S. at 578). The harmless error review *itself* violates the defendant's Sixth Amendment right to a trial by jury. For that reason, no matter how overwhelming the evidence in the record, reversal is required when a trial court's instruction "allow[s] a finding of guilt based on a degree of proof below that required by the Due Process Clause." *Cage* v. *Louisiana*, 111 S. Ct. at 330.

CONCLUSION

The Sixth Amendment guarantees to a criminal defendant the right to have a *jury* determine whether the prosecution has proven him guilty beyond a reasonable doubt. When an appellate court conducts harmless error review of an erroneous reasonable doubt instruction, as the Louisiana Supreme Court did here, it usurps the jury's role and violates the jury trial guarantee. The judgment below should be reversed, and the case should be remanded for a new trial.

Respectfully submitted,

BARRY S. SIMON
(Counsel of Record)
JOHN D. CLINE
WILLIAMS & CONNOLLY
725 Twelfth Street, N.W.
Washington, D.C. 20005
(202) 434-5000
(For the National Association of Criminal Defense Lawyers)